No. 85-833

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHULA VISTA CITY SCHOOL DISTRICT, et al.,

Petitioners,

v.

T. H. BELL, United States Secretary of Education,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LLOYD M. HARMON, JR.,
County Counsel
COUNTY OF SAN DIEGO
DANIEL J. WALLACE, Chief Deputy
LEONARD W. POLLARD II, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
Telephone: (619) 236-3651

DONALD JAY SOLOMON
319 Elm Street, Suite 215
San Diego, California 92101
Telephone: (619) 232-1197

Attorneys for Petitioners

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275 3050

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QUESTIONS PRESENTED

1. Whether precedent should be established which conflicts with this Court's prior holdings and allows a federal administrative agency to temporarily suspend agency regulations in conducting an "experimental aberration" from a long-standing policy, resulting in unequal treatment for 55 California class member school districts from 700 other school districts in the United States during Fiscal Year 1979, with the consequent loss of $12,000,000 to the class members.

2. Whether an unwritten rule of the Department of Education which limits a school district's rate for Impact Aid to no more than $50.00 over the amount the school district raises locally for its non-federally-connected children, is inconsistent with the Impact Aid statute, where the legislative history to the statute specifically precludes considering merely current expenditures met from local revenues of the district in question in arriving at the school districts' rate for Impact Aid.

PARTIES TO THE PROCEEDINGS

This litigation was commenced by the filing of complaints for judicial review of the decision of the United States Secretary of Education and for declaratory relief and mandamus. Petitioners are class member California school districts (hereinafter referred to as the "class members"). Respondent is T. H. Bell, United States Secretary of Education (hereinafter referred to as the "Secretary"). The petitioners are Chula Vista City School District representing the class, and Poway Unified School District and Sweetwater Union High School District.

The class member California school districts include:

Alpine Union Elementary School District
Antelope Valley Union High School District
Atwater Elementary School District

Berryessa Union Elementary School District
Brentwood Union Elementary School District
Byron Union Elementary School District
Chula Vista City Elementary School District
Colton Joint Unified School District
Cupertino Union Elementary School District
Escondido Union High School District
Folsom-Cordovia Unified School District
Fountain Valley Elementary School District
Grossmont Union High School District
Hayward Unified School District
Lancaster Elementary School District
Lassen Union High School District
Lemoore Union Elementary School District
Livermore Valley Joint Unified School District
Los Alamitos Unified School District
Los Banos Unified School District
Marysville Joint Unified School District
Modesto City Schools
Napa Valley Unified School District
National Elementary School District
Newark Unified School District
North Sacramento Elementary School District
Novato Unified School District
Oakley Union Elementary School District
Orcutt Union Elementary School District
Palmdale Elementary School District
Placer Union High School District
Poway Unified School District
Redlands Unified School District
Rescue Union Elementary School District
Rio Linda Union Elementary School District
Riverside Unified School District
Round Valley Unified School District
St. Helena Unified School District
San Bernardino City Unified School District
San Jacinto Unified School District

San Juan Unified School District
San Pasqual Valley Unified School District
San Ramon Valley Unified School District
Santa Maria Joint Union High School District
Santee Elementary School District
Soledad Union Elementary School District
Surprise Valley Joint Unified School District
Susanville Elementary School District
Sweetwater Union High School District
Vallejo City Unified School District
Valley Center Union Elementary School District
Walnut Creek Elementary School District
Westside Union Elementary School District
Wheatland Elementary School District
Wheatland Union High School District

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No. _____

IN THE

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OCTOBER TERM, 1985

CHULA VISTA CITY SCHOOL DISTRICT, et al.,

Petitioners,

v.

T. H. BELL, United States Secretary of Education,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered into this proceeding on August 16, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 762 F.2d 762 and is reprinted as Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1985. The Order Denying Petition For Rehearing was entered August 16, 1985 and is reprinted as Appendix B. This court's jurisdiction is invoked under 28 United States Code Section 1254(1).

STATUTES INVOLVED

The pertinent federal statutes involved are Public Law 81-874 codified as 20 United States Code Sections 236 through 238 which are set out in Appendix C.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the District Court included a complaint for declaratory relief arising under the Constitution and laws of the United States (28 U.S.C., § 1331(a)), for mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiffs (28 U.S.C., § 1361), and for judicial review, under the Administrative Procedures Act, of actions of federal agencies (5 U.S.C., §§ 701-706).

The federal government provides compensation to school districts which educate children of federally employed parents who reside on or are employed on federal land because the federal land is exempt from local property taxation (20 U.S.C., § 236 et seq. -"Impact Aid"). Since 1977 in California, the amount of compensation could be based upon the amount "generally comparable" school districts raise and spend from local taxes to educate their children. If the "generally comparable" non-federally burdened school districts raise and spend (from local taxes) $50.00 more per child than the federally burdened applicant school district, then the Secretary rules them *not* to be "generally comparable" to the

federally burdened applicant school districts ($50 Rule) - *i.e.*, the Secretary puts a $50.00 cap on the amount of federal compensation per child in federally burdened school districts. The Secretary has employed the $50 Rule since he began administration of the statute in 1950, when the standard was "most nearly comparable;" however, the applicable statutory standard in this case is "generally comparable."

For Fiscal Year 1979, the Secretary processed school districts' applications nationwide without reference to the $50 Rule. The class member school districts, upon learning applications were being processed without the $50 Rule, submitted amended applications for Impact Aid. The Secretary then, in the latter part of Fiscal Year 1979, reinstated the $50 Rule only as to the class members and rejected their amended applications.

The class members requested an administrative hearing to review the Secretary's rejection of their applications under the $50 Rule. The Administrative Law Judge, whose decision the Secretary adopted, upheld the $50 Rule, although he found it unrealistic. The Administrative Law Judge's decision is reprinted as Appendix D.

The class member school districts then filed an action in the District Court for review of the Secretary's decision and for declaratory relief and mandamus. In granting summary judgment for the school districts, the District Court held the $50 Rule invalid; it found the $50 Rule was explicitly discouraged by H. R. 2287 (81st Congress, June 20, 1950), which states in part that ". . . [I]t would not be reasonable to consider merely current expenditures met from local revenue of the district in question," in a school district's application for "Impact Aid." The District Court's judgment, which incorporates an oral announcement of decision, is reprinted as Appendix E; the pertinent part of H.R. 2287, pages 11-14, as to "Children Residing On, Or Whose Parents Are Employed On, Federal Property" is reprinted as Appendix F.

The Ninth Circuit Court of Appeals reversed the District Court's judgment. It concluded that the $50 Rule does not violate the legislative intent. The Court of Appeals went on to conclude the unwritten, unpublished $50 Rule was not subject to notice and comment under the General Education Provisions Act ([hereinafter referred to as "GEPA"] 20 U.S.C., §§ 1221-1234e). Lastly, the Court of Appeals held that the reapplication of the $50 Rule did not violate the uniformity requirements of 20 U.S.C., § 1232(c) since it was not enforced against plaintiffs in any meaningful sense. Instead, the Secretary's temporary suspension of the Rule and consequent approval of some applications which did not comply with it was an experimental aberration from a longstanding policy."

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEAL'S DECISION EXPANDS THE PRECEDENT OF DEFERENCE TO AGENCY ACTION TO INCLUDE A "TEMPORARY SUSPENSION" OF AGENCY RULES AS AN "EXPERIMENTAL ABERRATION," RESULTING IN UNEQUAL TREATMENT FOR CALIFORNIA CLASS MEMBER SCHOOL DISTRICTS FROM OTHER SCHOOL DISTRICTS THROUGHOUT THE FIFTY STATES, CAUSING A $12,000,000 LOSS TO THE CLASS MEMBERS

In its opinion, the Court of Appeals for the Ninth Circuit referenced 20 United States Code Section 1232(c) providing "[a]ll such regulations shall be uniformly applied and enforced throughout the fifty states." However, without explanation, the Court of Appeals concludes ". . . [t]he $50 Rule was not selectively enforced against plaintiffs in any meaningful sense." The Court of Appeals goes on to uphold the "experimental aberration," but

without citation of authority. (Opinion, page 14, lines 24-26, page 15, lines 1-2.)

The Secretary did not apply the $50 Rule to applications for Impact Aid by school districts across the United States during the first part of Fiscal Year 1979; however, when the California class member applications came before the Secretary in the latter part of Fiscal Year 1979, he did apply the $50 Rule. Using the Chula Vista City School District as an example, the Secretary's action denied the school district approximately $181.52 per federal child.

This Court has held agency violations of its own regulations is inconsistent with standards of agency action which the APA directs the courts to enforce. (*United States v. Caceres* (1979) 440 U.S. 741, 753-754 in reviewing prior opinions.) This court has also held that, no matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of funds. (*Morton v. Ruiz* (1974) 415 U.S. 199, 232.) The Secretary's employment of an "experimental aberration" in determining eligibility for funds during Fiscal Year 1979 falls far outside of permissible parameters for the valid exercise of agency discretion; it determines eligibility for funds on an ad hoc basis. The precedent of allowing an "experimental aberration" to determine eligibility for funds on an ad hoc basis broadly impacts locally funded school programs throughout the fifty states and should be considered by this Court.

The Court of Appeal concludes the "Impact Aid" sought by the class members far exceeds "compensation." (Opinion, page 12, line 13.) The Court of Appeals misconstrues the funding provisions. For example, the Chula Vista City School District raised $467.00 of local revenue per child but was classified as otherwise "generally comparable" to non-federally burdened school districts with an average contribution rate of $1473. The latter

figure's impact is illusive. Once a contribution rate is determined, that rate is "prorated" and/or "tiered" based upon the type of federal student, the percentage of federal children within the school district, and the congressional appropriations. For Chula Vista City School District, claimed funding would yield approximately $181.52 more money per federal child.

II.

THE COURT OF APPEALS DECISION ABDICATES THE COURT'S RESPONSIBILITY TO EXERCISE JUDICIAL REVIEW BY ALLOWING THE SECRETARY OF EDUCATION TO IMPOSE A RULE WHICH IS DIRECTLY CONTRARY TO THE LEGISLATIVE HISTORY OF THE ACT BEING ADMINISTERED

Though the courts generally defer to long-standing agency rules interpreting statutes, they do not do so where the interpretation is inconsistent with the statutory mandate. (*Securities Exchange Commission v. Sloan* (1978) 436 U.S. 103, 118.)

Both the District Court and the Court of Appeals saw as the central issue of the case the validity or invalidity of the "Rule" called the "$50 Rule." The District Court found the $50 Rule invalid, as contrary to the Impact Aid statute. In doing so, it noted the following legislative history:

> "In a school district providing education to large numbers of children connected with federal property, the current expenditures will be affected by the fact that the federal government is not contributing its proper share of local school revenues. Hence, in arriving at a sum which would approximate the cost of providing education to the federal children in question, it would not be reasonable to consider merely current expenditures met from

local revenues of the district in question." (H.R. 2287, p. 14, 81st Congress, 2nd Sess. (1950).)

The District Court concluded that the $50 Rule is a cap based on the applicant districts' current expenditures met from local revenues, and is therefore precluded as contrary to the statutory mandate.

The Court of Appeals did not consider the above language as controlling, and therefore allowed the $50 Rule to stand.

CONCLUSION

The class member school districts operate like other school districts throughout the fifty states; however, the class members are burdened by federal taking of land within their boundaries. The burdening is reflected in (1) costs incurred in providing education for children connected with the federal lands, and (2) loss of federal lands from local property taxation. To compute federal compensation, under the Impact Aid law, the burdened school districts may compare themselves to non-burdened school districts, if the burdened school district is otherwise "generally comparable" to the non-burdened school districts.

Under the Court of Appeals decision, the existence of the "generally comparable" standard would be unduly limited by the $50 Rule. The Court of Appeals decision recognizes that the $50 Rule is a cap, but allows the Secretary to ignore the statutory mandate by considering only expenditures met from local revenues of the district in question.

Further, the Court of Appeals misconstrues the law in concluding that the requested awards ". . . far exceed 'compensation'" and allows an agency to conduct an "experimental aberration" without presidential authority. The agency may not exercise an unbridled discretion to decline to enforce regulations against

some and to enforce them against others. If a regulation is administered with an unequal hand, the action is invalid. The effect of the Court of Appeals decision will be widespread. Therefore, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

DATED: November 13, 1985

Respectfully submitted,

LLOYD M. HARMON, JR.,
County Counsel
COUNTY OF SAN DIEGO

By_____
DANIEL J. WALLACE,
Chief Deputy

By_____
LEONARD W. POLLARD II,
Deputy

_____
DONALD JAY SOLOMON

Attorneys for Petitioners

APPENDIX A

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CLERK, U.S. COURT OF APPEALS

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHULA VISTA CITY SCHOOL DISTRICT, Plaintiff/Appellee, v. T.H. BELL, United States Secretary of Education, Defendant/Appellant.	No. 83-5627 D.C. NOs. CV-81-1065-S, 81-1182-S
CHULA VISTA CITY SCHOOL DISTRICT, Plaintiff/Appellant, v. T.H. BELL, United States Secretary of Education, Defendant/Appellee.	No. 83-5631 D.C. Nos. CV 81-1065(s)(H), 81-1182(S)(H) OPINION

On appeal from the United States District Court
for the Southern District of California
Edward J. Schwartz, District Judge, Presiding

Argued and submitted
December 5, 1984, Los Angeles, California

Before: WALLACE, BOOCHEVER, and HALL, Circuit Judges.

BOOCHEVER, Circuit Judge:

At issue is the validity of a rule used by the Secretary of Education in determining the amount granted to local school districts by the federal government to compensate them for the burden of educating children who live on federal property that the districts cannot tax. We uphold the Secretary's rule.

BACKGROUND

Most school districts and local education agencies (LEA's) are funded by a tax on the value of real property within their boundaries. States and their subdivisions, however, may not tax property owned by the federal government. *See generally* H.R. Rep. No. 2287, 81st Cong., 2d Sess. 1-2 (1950) [hereinafter cited as House Report]. To mitigate various burdens placed on school districts by federal ownership, Congress enacted the Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236-241ff (1982 & Supp. I 1983)) (the "Impact Aid law" or the "statute"). At the center of this controversy is 20 U.S.C. § 238 which addresses specifically LEA's, such as the plaintiffs, which must educate children whose parents live or work on nontaxable federal property. The section provides that for each such child an LEA shall receive an amount which is based on the amount spent from local revenues per child in "generally comparable" school districts. 20 U.S.C. § 238(d)(3)(A). The statute leaves the determination of comparability to the Secretary, who has promulgated regulations therefor. *See* 34 C.F.R. pt. 222 (1984) (previously codified at 45 C.F.R. pt. 115). Two methods are presently used to make this determination. Under the one used in California, a district selects approximately five other districts in the state which it believes are generally comparable to itself. The selections are subject to the Secretary's disapproval. *See* 20 U.S.C. § 238(d)(3)(A); 34 C.F.R. §§ 222.30-.32 (1984).

Since he began to administer the statute in 1950, the Secretary has employed the "$50 Rule" (the Rule) disputed here. If the average local contribution of the five selected districts is more than $50 in excess of the local contribution per non-federally-connected child in the subject district, they are not considered comparable. In effect, the rule awards for each federally-connected child approximately the amount a district raises locally for its non-federally-connected children.

In addition to the $50 Rule, the Secretary's regulations require that the allegedly comparable districts be similar to the applicant district upon at least five of fourteen criteria in a "grid" comprising legal classification, total average daily attendance, total cost per pupil, cost per pupil paid from local sources, grade levels maintained, percent of pupils transported, pupil-teacher ratio, assessed valuation per pupil, ratio of assessed value to true value, tax rate for all school purposes, tax rate for current expenses, curricula offered, teachers' salaries, and economic characteristics.

Eight districts, which had previously filed applications conforming to the regulations, amended and resubmitted them when they learned the Department had decided as an experimental policy not to enforce the $50 Rule. In May and June of 1979 analysts in the Department of Education approved the eight applications, employing the grid but not requiring adherence to the Rule. In those applications, the applicants designated as "generally comparable," districts which were similar on at least five of the grid's criteria but whose local contributions far exceeded those of the applicant. For example, class representative Chula Vista's local contribution in the year used for purposes of comparison was $467 while those of the districts named in its application averaged $1,473.

In July the Director of the Division of School Assistance in Federally Affected Areas (DSAFA) decided to deny the applications on the ground, inter alia, that they did not comply with the Department's regulations.

The school district challenged the denial. The Administrative Law Judge held that the $50 Rule was consistent with the statute and the regulations and that it was not required by the General Education Provisions Act (GEPA), 20 U.S.C. §§ 1221-1234e (1982 & Supp. I 1983), to be published before promulgation. The Secretary declined to review this decision and plaintiffs appealed.

On cross motions for summary judgment, the district court reversed, holding that the $50 Rule was inconsistent with the legislative intent of the statute. The court agreed, however, that GEPA was not violated by the Department's failure to publish the rule. The court ordered the Secretary to review the amended applications whose approval had been rescinded by the Director of DSAFA and to award applicants amounts equivalent to the local contributions of the allegedly comparable districts if those districts were similar to the applicants on the first and fourth grid criteria and any three of the other twelve.

I. Jurisdiction

Although we ordinarily will not consider issues which were not raised below, we must inquire *sua sponte* whether the district court had subject matter jurisdiction of this action. Fed. R. Civ. P. 12(h)(3); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939).

The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1982), vests exclusive jurisdiction in the Claims Court of actions against the United States which are based on "any Act of Congress, or any regulation of an executive department" and which seek monetary damages in an amount greater than $10,000. "Moreover, it is firmly established that, where the real effort of the complaining party is to obtain money from the federal government, the exclusive jurisdiction of the court of claims . . . cannot be evaded . . . by framing a district court complaint to appear to seek only injunctive, mandatory or declaratory relief against government officials . . . ." *Bakersfield City School District v. Boyer*, 610 F.2d 621,

628 (9th Cir. 1979); *accord McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590-91 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 243 (1984).

The instant appeal is from a class action represented by Chula Vista City School District (Chula Vista) and an action brought jointly by Poway Unified School District (Poway) and Sweetwater Union High School District (Sweetwater), which were consolidated in the district court. Although both complaints purport to ask for equitable relief, the "real effort" of each is to seek money. Chula Vista's complaint demanded "[t]hat the [District] Court declare that the class members be entitled to the local contribution rates requested in their highest revised Applications for . . . 1979" and "issue a mandatory injunction ordering . . . Defendant to . . . pay to the class members [aid for] 1979 based on their highest revised Applications." Similarly, plaintiffs Poway and Sweetwater prayed "[t]hat the court declare that plaintiffs are entitled to the local contribution rate requested in their revised applications for . . . 1979" and "compel defendant . . . to approve their revised applications."

The revised applications of plaintiffs Poway and Sweetwater requested, in addition to aid already paid pursuant to applications that conformed with the $50 Rule, $462,000 and $167,000 respectively. These claims clearly exceeded the jurisdictional amount.

The aggregate claims of the class that were denied by the Secretary total in excess of twelve million dollars. The claims of the class members, however, do not stem from "a single title or right in which they have a common and undivided interest." *Snyder v. Harris*, 394 U.S. 332, 335 (1969) (discussing aggregation for diversity jurisdiction in class action). Thus, in determining the amount in controversy for jurisdictional purposes, this court looks to the claim of each individual class member rather than the total claims of the class. *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981) (Tucker Act, class action), *cert. denied*, 454 U.S. 1146 (1982); *March v. United States*, 506 F.2d 1306, 1309 n.1 (D.C. Cir. 1974)

(same); *see also Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (minimum amount for diversity jurisdiction, class action); *Glover v. Johns-Manville Corp.*, 662 F.2d 225, 231 (4th Cir. 1981) (Tucker Act, multiple third-party complainants). Class members whose claims appear on the record to meet the jurisdictional requirement can maintain the action, but the others must be dismissed. *See Zahn*, 414 U.S. at 301 (diversity jurisdiction); *Paul Gray*, 306 U.S. at 590 (same). The difference between the amounts requested in the original and the amended applications of six of the fifty-five class members was ten thousand dollars or less.[1] The claims of the other class members are dismissed for lack of jurisdiction.

II. Consistency of the $50 Rule With the Impact Aid Law

A. Standards of Review

This court reviews the district court's summary judgment de novo. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983).

The amount of deference due to the Secretary's formulation of the Rule itself was stated in *Good Samaritan Hospital, Corvallis v. Mathews*, 609 F.2d 949 (9th Cir. 1979): "if an agency's interpretation of a statute . . . is not clearly outside its authority, then the courts should defer to the agency's expertise." *Id.* at 954 (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). Deference is made especially appropriate by the fact that the institution of the $50 Rule was contemporaneous with the implementation of the Impact Aid law. *See Tallman*, 380 U.S. at 16, *quoting Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961).

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[1] Brentwood Union Elementary School District ($8007.13); Byron U.E.S.D. ($3589.05); Oakley U.E.S.D. ($6825.40); Rescue U.E.S.D. ($9528.41); St. Helena Unified School District ($3309.34); and Soledad U.E.S.D. ($8497.41).

B. Analysis

The Impact Aid law, as noted above, requires the selection of "generally comparable" school districts but does not give any guidance for determining comparability. The district court found the $50 Rule to be inconsistent with the statute on the basis of the following legislative history.

> Among other things the Commissioner would first consider similarity of classification under State law, and then other relevant factors, such as number and kind of school population, tax resources, tax effort, costs of school maintenance and operation, and the like.

House Report, *supra*, at 14. The court reasoned that

> if Congress had intended to limit an applicant's local contribution rate to an amount that was close to/or within some kind of a tolerance of expenditures, of local revenues of that district, I think it would have been very simple to do so. Congress could have specifically said there shall be a limit, there shall be a cap. Now, the statute requires a comparison of districts more than a single criterion or rule, and the fifty dollar rule which appears to me in its effect an application here as a cap . . . I don't think is consistent with the statute . . . .

The district court apparently concluded that no single factor, such as local contribution rate, could be controlling in the sense that dissimilarity of that one criterion would eliminate a school from being considered "comparable" for purposes of the statute. To take a simple example, the district court would consider a candidate eligible for comparable status to the applicant even though dissimilar as to local contribution under the $50 Rule, if there was similarity in five of the fourteen grid criteria.

We do not think the district court's conclusion necessarily follows from the legislative history. Congress' enumeration of several factors does not limit the Secretary's power to deem some more important than others, even to the extent of being controlling. Thus, it is not unreasonable for the Secretary to consider some criteria to be more indicative than others and one, such as similarity in local contribution, to be so important that a candidate must meet it to be considered comparable. This is precisely the kind of statutory interpretation to which the Supreme Court has indicated that we should defer; namely, the application of administrative expertise to implement a reasonable interpretation of congressional intent. *See generally Tallman*, 380 U.S. at 16; *see also Hawaiian Electric Co. v. EPA*, 723 F.2d 1440, 1447 (9th Cir. 1984).

Another portion of the House Report is more difficult to interpret. The report inadequately explains the need for the device of 'generally comparable' districts:

> In a school district providing education to large numbers of children connected with Federal property, the current expenditures will be affected by the fact that the Federal Government is not contributing its proper share of local school revenues. Hence, in arriving at a sum which approximates the cost of providing education to the Federal children in question, it would not be reasonable to consider merely current expenditures met from local revenues of the district in question.

House Report, *supra*, at 14.

Plaintiffs explain this passage by suggesting that it would be unfair to award an applicant (for each federally-connected child) an amount equal to its total local contribution divided by the number of its non-federally-connected pupils. They intimate that this is true because the federal government generally takes the most

valuable property in a school district and that in its absence local contribution per child would rise without an increase in property tax rates. But there is no evidence for the factual predicate that land taken by the government is of greater than average value. *See* House Report, *supra*, at 4 (noting that land taken by the government was "sometimes very valuable" but that "[i]n some cases the original value of the land was not great and the tax revenue eliminated is inconsequential"). In addition, this argument assumes that section 238 intends to compensate districts for their loss of income resulting from a reduction in tax base caused by the government's acquisition of real property. But the House Report states that under section 238, "Federal payments to school districts are more closely related to the 'burden imposed' than to the value of the Federal property." House Report, *supra*, at 11. In fact, 20 U.S.C. § 237, which is not involved in this dispute, does compensate districts for their decreased tax base due to federal occupation of property and there is no suggestion that the operation of section 238 precludes concurrent application of section 237. In fact, section 237 seems to be written to accommodate simultaneous application of the two. *See* 20 U.S.C. § 237(a)(3).

The cryptic portion of the House Report states that "it would not be reasonable to consider merely current expenditures met from local revenues of the district in question." If the current expenditures were divided by the number of non-federal pupils an inflated cost per pupil would be obtained. For example if total school expenditures were $100,000 and there were twenty students, of whom ten were federal, average costs determined by non-federal students would be $10,000 although actually only $5,000 would be expended per pupil. More conjecture is required if we hypothesize dividing expenditures by the total number of federal and non-federal children. It would be likely, however, that, prior to the passage of the Act, when a substantial number of federal children impacted the district the average cost of federal and non-federal pupils would be lower than in comparable non-impacted districts. To provide equivalent educational services for the increased number required higher tax rates. Resistance to such

increased taxes would be apt to cause a lower amount to be spent per child. Thus the device of "comparable districts" achieved a more equitable reimbursement than either of these more simple measures.

The one clear observation that can be drawn from the legislative history is that impact aid "seeks to compensate school districts in reasonable amounts for the *cost* of educating children who . . . reside on tax-exempt Federal property." House Report, *supra*, at 11 (emphasis added). This intention was also expressed in the statute. *See* 20 U.S.C. § 236(2). Plaintiff Chula Vista's local contribution per non-federally-connected child was $467, while the amount of recoupment it claimed for each federally-connected child in its second amended application was $1,473. Such an award would far exceed "compensation."

The legislative history admonishes the Secretary, when determining comparability, to consider districts' "tax resources, tax effort, costs of school maintenance and operation, and the like." House Report, *supra*, at 14. In fact, it mentions specifically only two nonfinancial factors (classification under state law and number and type of school population). This concern supports the emphasis given by the $50 Rule.

Finally, the Secretary observes that sometime after the enactment of the Impact Aid law, Congress considered abolishing the method involved here of determining comparable districts in which an applicant district proposes allegedly comparable districts. Congress feared that "[a]n applicant district which uses [this method] may 'hunt around' . . . to find . . . districts with the highest local expenditure per child, which it feels it can justify as being comparable." H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3844, 3876. Ultimately, Congress found no such abuse and permitted this method, *compare* Elementary & Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 201(b), 80 Stat. 1191, 1210 *with* Elementary & Secondary Education Amendments of 1967, Pub.

L. No. 90-247, § 206, 81 Stat. 783, 809 (1968), very possibly because the $50 Rule was then in effect.

In sum, although isolated portions of the legislative history might favor the plaintiffs' position, we conclude that the bulk of the legislative history supports the $50 Rule, which relates the amount of federal aid to the local contribution rate.

III. Notice and Comment Procedures

The parties agree that because it concerns the conditions under which the federal government makes a grant, the $50 Rule is not required to comply with the Administrative Procedure Act (APA). *See also* 5 U.S.C. § 553(a)(2) (1982); *Good Samaritan Hospital*, 609 F.2d at 953.

The class representatives, however, do argue that the district court erred in holding that similar notice provisions in GEPA do not apply to the Rule. That Act, 20 U.S.C. § 1232(b), states that

> (1) No proposed regulation prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.
>
> (2)(A) During the thirty-day period prior to the date upon which such regulation is to be effective, the Commissioner shall, in accordance with the [APA, observe notice-and-comment procedures].

Section 1232(a)(1) clarifies that "[f]or the purpose of this section, the term 'regulation' means any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Commissioner."

In referring to these provisions, however, Congress stated that "all agencies and organizations which are recipients of federal education funds must be apprised of any proposed *additions* or *changes* which affect their programs and must be afforded an opportunity to comment upon them." H.R. Rep. No. 805, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4093, 4154 (emphasis added). Thus, the body of rules and regulations already in effect when GEPA was passed, including the rule at issue here, was not meant to be subjected to its notice-and-comment provisions.

This conclusion is supported by the fact that when Congress in 1972 required the Commissioner of Education to conduct a study of existing rules and regulations and to publish those rules in the *Federal Register* after an opportunity for notice-and-comment hearings, it excepted from such study and publication unpublished rules and rules which had been issued prior to July 1, 1965. *See* Education Amendments of 1972, Pub. L. No. 92-318, § 503(a), 86 Stat. 235, 346.

IV. Uniform Application of the Rule

A. 20 U.S.C. § 1232(c)

20 U.S.C. § 1232(c) provides that "[a]ll such regulations shall be uniformly applied and enforced throughout the fifty States." Plaintiffs argue that this provision was violated because "the Agency applied the grid without the '$50 Rule' in its review processes for fiscal year 1979 except with respect to the Class Members' amended applications."

In this case, the $50 Rule was not selectively enforced against plaintiffs in any meaningful sense. Instead, the Secretary's temporary suspension of the rule and consequent approval of some applications which did not comply with it was an experimental aberration from a longstanding policy.

The apparent purpose of section 1232(c) is to promote nationwide uniformity in application and enforcement of the Secretary's regulations. It would not further this purpose to prevent the Secretary from changing policy. Yet if we adopted plaintiffs' position, we would in effect preclude the Secretary from reimplementing a regulation after experimenting and discovering that it was indeed necessary. We hold that the Secretary's temporary suspension of the $50 Rule was not a violation of section 1232(c).

B. Estoppel

The school districts also argue that the government is estopped from enforcing the $50 Rule as to them. The Supreme Court has never decided that estoppel may run against the government. *See Heckler v. Community Health Services*, 104 S. Ct. 2218, 2224 (1984); *see also United States v. Locke*, 105 S. Ct. 1785, 1790 n.7 (1985); *id.* at 1801-02 (O'Connor, J., concurring) (declining to rule on estoppel against federal government but suggesting parties raise it on remand). Furthermore, even if the government can be estopped "it is well-settled that the Government may not be estopped on the same terms as any other litigant. . . . [T]he private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler*, 104 S. Ct. at 2224 (footnotes omitted). Among those elements, it is "tolerably clear" that "the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" *Id.* at 2223 & n.9, *quoting* III J. Pomeroy, *Equity Jurisprudence* § 805, at 192 (S. Symons ed. 1941).

In this case, plaintiffs have alleged no such change in position. There is no allegation that plaintiffs have, in reliance on the approval of their amended applications, incurred obligations which they will be unable to discharge. Moreover, the *Community Health Services* Court held that such obligations, even though they might bankrupt the private party, did not suffice to show prejudicial reliance. *See id.* at 2225. The government is not estopped

from enforcing the $50 Rule.

CONCLUSION

We hold that the district court could properly assert subject matter jurisdiction over only six of the class plaintiffs. The Secretary's $50 Rule is consistent with the Impact Aid law and is not required to comply with the notice-and-comment provisions of the General Education Provisions Act. The judgment of the district court is therefore

REVERSED.

APPENDIX B

FILED
AUG 16 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHULA VISTA CITY SCHOOL DISTRICT,

Plaintiff/Appellee,

v.

T.H. BELL, United States Secretary of Education,

Defendant/Appellant.

No. 83-5627
D.C. Nos. CV-81-1065-S, 81-1182-S

CHULA VISTA CITY SCHOOL DISTRICT,

Plaintiff/Appellant,

v.

T.H. BELL,

Defendant/Appellee.

No. 83-5631
D.C. Nos.
CV 81-1065(s) (H), 81-1182(S) (H)

ORDER

Before: WALLACE, BOOCHEVER, and HALL, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

IMPACT AID LAW

20 U.S.C. § 236 through § 238 (excerpted)

FINANCIAL ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITY

§ 236. Declaration of policy

In recognition of the responsibility of the United States for the impact which certain Federal activities have on the local educational agencies in the areas in which such activities are carried on, the Congress hereby declares it to be the policy of the United States to provide fiancial assistance (as set forth in the following sections of this title [20 USCS §§ 236 et seq.]) for those local educational agencies upon which the United States has placed financial burdens by reason of the fact that—

(1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or

(2) such agencies provide education for children residing on Federal property; or

(3) such agencies provide education for children whose parents are employed on Federal property; or

(4) there has been a sudden and substantial increase in school attendance as the result of Federal activities.

(Sept. 30, 1950, c. 1124, § 1, Title I, 64 Stat. 1100; Apr. 11, 1965, P. L. 89-10, Title I, § 2, 79 Stat. 23.)

§ 237. Federal acquisition of real property

(a) Where the Commissioner, after consultation with any local educational agency and with the appropriate State educational agency, determines for any fiscal year ending prior to July 1, 1978—

(1) that the United States owns Federal property in the school district of such local educational agency, and that such property (A) has been acquired by the United States since 1938, (B) was

not acquired by exchange for other Federal property in the school district which the United States owned before 1939, and (C) had an assessed value (determined as of the time or times when so acquired) aggregating 10 per centum or more of the assessed value of all real property in the school district (similarly determined as of the time or times when such Federal property was so acquired); and

(2) that such acquisition has placed a substantial and continuing financial burden on such agency; and

(3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition by increases in revenue accruing to the agency from the carrying on of Federal activities with respect to the property so acquired,

then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Commissioner, is equal to the continuing Federal responsibility for the additional financial burden with respect to current expenditures placed on such agency by such acquisition of property. Such amount shall not exceed the amount which, in the judgment of the Commissioner, such agency would have derived in such year, and would have had available for current expenditures, from the property acquired by the United States (such amount to be determined without regard to any improvements or other changes made in or on such property since such acquisition).

(b) For the purposes of this section any real property with respect to which payments are being made under section 13 of the Tennessee Valley Authority Act of 1933, as amended [16 USCS § 831*l*], shall not be regarded as Federal property.

(c) Where the school district of any local educational agency shall have been formed at any time after 1938 by the consolidation of two or more former school districts, such agency may elect (at the time it files application under section 5 [20 USCS § 240]) for any fiscal year to have (1) the eligibility of such local educational agency, and (2) the amount which such agency shall be entitled to receive, determined under this section only with respect to such of

the former school districts comprising such consolidated school district as the agency shall designate in such election.

§ 238. Children residing on, or whose parents are employed on federal property

(a) **Children of persons who reside and work on federal property**. For the purpose of computing the amount to which a local educational agency is entitled under this section for any fiscal year, the Commissioner shall determine the number of children who were in average daily attendance at the schools of such agency, and for whom such agency provided free public education, during such fiscal year, and who, while in attendance at such schools, resided on Federal property and—

(1) did so with a parent employed on Federal property situated (A) in whole or in part in the county in which the school district of such agency is located, or (B) if not in such county, in whole or in part in the same State as the school district of such agency; or

(2) had a parent who was on active duty in the uniformed services (as defined in section 101 of title 37, United States Code [37 USCS § 101]).

In making a determination under clause (2) of the preceding sentence with respect to a local educational agency for any fiscal year, the Commissioner shall include the number of children who were in average daily attendance at the schools of such agency, and for whom such agency provided free public education, during such year, and who, while in attendance at such schools, resided on Indian lands, as described in clause (A) of section 403(1) [20 USCS § 244].

(b) **Children of persons who reside or work on federal property**. For the purpose of computing the amount to which a local educational agency is entitled under this section for any fiscal year ending prior to July 1, 1978, the Commissioner shall, in addition to any determination made with respect to such agency under subsection (a), determine the number of children (other than children with respect to whom a determination is made for such fiscal year

under subsection (a)) who were in average daily attendance at the schools of such agency, and for whom such agency provided free public education, during such fiscal year and who, while in attendance at such schools either—

(1) resided on Federal property, or

(2) resided with a parent employed on Federal property situated (A) in whole or in part in the county in which the school district of such agency is located, or (B) if not in such county, in whole or in part in the same State as the school district of such agency, or

(3) had a parent who was on active duty in the uniformed services (as defined in section 101 of title 37, United States Code [37 USCS § 101]).

For such purpose, with respect to a local educational agency, in the case of any fiscal year ending prior to July 1, 1978, the Commissioner shall also determine the number of children (other than children to whom subsection (a) or the preceding sentence applies) who were in average daily attendance at the schools of such agency and for whom such agency provided free public education, during such fiscal year, and who, while in attendance at such schools resided with a parent who was, at any time during the three-year period immediately preceding the beginning of the fiscal year for which the determination is made, a refugee who meets the requirements of clauses (A) and (B) of section 2(b)(3) of the Migration and Refugee Assistance Act of 1962 [22 USCS § 2601] except that the Commissioner shall not include in his determination under this sentence for any fiscal year any child with respect to whose education a payment was made under section 2(b)(4) of such Act [22 USCS § 2601].

(c) **Eligibility of payments.** (1) Except as is provided in paragraph (2), no local educational agency shall be entitled to receive a payment for any fiscal year with respect to a number of children determined under subsection (a) and subsection (b), unless the number of children so determined with respect to such agency amounts to—

(A) at least four hundred such children; or

(B) a number of such children which equals at least 3 per centum of the total number of children who were in average daily attendance, during such year, at the schools of such agency and for whom such agency provided free public education;

whichever is the lesser.

(2)(A)(i) Clause (B) of paragraph (1) shall not operate to make any local educational agency eligible for a payment under this section for any fiscal year unless the number of children with respect to whom determination was made under subsections (a) and (b) respecting such agency for that fiscal year is at least ten.

(ii) If a local educational agency is eligible for a payment for any fiscal year by the operation of clause (B) of paragraph (1), it shall continue to be so eligible for the two succeeding fiscal years even if such agency fails to meet the requirement of such clause (B) during such succeeding fiscal years, except that the number of children determined for the second such succeeding fiscal year with respect to such agency for the purpose of any clause in paragraph (1) of subsection (d) shall not exceed 50 per centum of the number of children determined with respect to such agency for the purpose of that clause for the last fiscal year during which such agency was so eligible.

(iii) If the Commissioner determines with respect to any local educational agency for any fiscal year that—

(I) such agency does not meet the requirement of clause (B) of paragraph (1); and

(II) the application of such requirement, because of exceptional circumstances, would defeat the purposes of this title; the Commissioner is authorized to waive such requirement with respect to such agency.

(B) No local educational agency shall be entitled to receive a payment for any fiscal year with respect to a number of children determined under the second sentence of subsection (b) unless the number of children so determined constitutes at least 20 per centum of the total number of children who were in average daily attendance at the schools of such agency and

for whom such agency, during such fiscal year, provided free public education.

(d) **Amount of payments.** (1) Except as is provided in paragraph (2), the amount to which a local educational agency shall be entitled under this section for any fiscal year shall be—

(A) in the case of any local educational agency with respect to which the number of children determined for such fiscal year under subsection (a) amounts to at least 25 per centum of the total number of children who were in average daily attendance at the schools of such agency during such fiscal year and for whom such agency provided free public education, an amount equal to 100 per centum of the local contribution rate multiplied by the number of children determined under such subsection plus the sum of the products obtained with respect to such agency under clauses (B)(iii), (B)(iv), and (B)(v); and

(B) in any other case, an amount equal to the sum of—

(i) the product obtained by multiplying 100 per centum of the local contribution rate by the number of children determined with respect to such agency for such fiscal year under clause (2) of subsection (a).

(ii) the product obtained by multiplying 90 per centum of the local contribution rate by the number of children determined with respect to such agency for such fiscal year under clause (1) of subsection (a),

(iii) the product obtained by multiplying 50 per centum of the local contribution rate by the number of children determined with respect to such agency for such fiscal year under clause (3) of subsection (b),

(iv) the product obtained by multiplying 45 per centum of the local contribution rate by the number of children determined with respect to such agency for such fiscal year under clauses (1) and (2)(A) of subsection (b), and

(v) the product obtained by multiplying 40 per centum of the local contribution rate by the number of children determined with respect to such agency for such fiscal year under clause (2)(B) of subsection (b).

(2)(A) Not later than December 1 during each fiscal year beginning after June 30, 1977, the Commissioner shall, except as is provided in clause (iii) in the third sentence of this subparagraph, determine the total number of children with respect to whom determinations are made under subsection (b) for all local educational agencies making application for payments under this section which meet the eligibility requirements set forth in subsection (c). The Commissioner shall determine the percentage which such number constitutes the total number of children who were in average daily attendance at the schools of such agencies during such fiscal year and for whom such agencies provided free public education. In calculating the products under clauses (B)(iii), (B)(iv), and (B)(v) of paragraph (1), with respect to any local educational agency for any fiscal year, the Commissioner shall reduce the number of children with respect to whom a determination is made under subsection (b) by a number equal to one-half of the number which the percentage determined under the preceding sentence constitutes of the total number of children with respect to whom such a determination is made and who were in average daily attendance at the schools of such agency during such fiscal year and for whom such agency provided free public education, except that—

(i) such percentage shall not exceed 4 per centum;

(ii) the number reduced shall not exceed three hundred; and

(iii) this subparagraph shall not apply to any local educational agency (I) with respect to which the number of children determined under subsection (b) for any fiscal year amounts to at least 10 per centum of the total number of children who were in average daily attendance at the schools of such agency during such fiscal year and for whom such agency provided free public education, or (II) during any fiscal year in which such agency receives more than 25 per centum of the funds for its current expenditures from payments under this section.

In determining the total number of children who were in average daily attendance at the schools of an agency during any fiscal year under clause (iii)(I) in the preceding sentence, the number of

children in such schools with respect to whom a determination is made under subsection (a) for such year shall not be considered.

(B) If the Commissioner determines that—

(i) the amount computed under paragraph (1), as is otherwise provided in this subsection with respect to any local educational agency for any fiscal year, together with the funds available to such agency from State and local sources and from other sections of this title [20 USCS §§ 236 et seq.] is less than the amount necessary to enable such agency to provide a level of education equivalent to that maintained in the school districts of the State which are generally comparable to the school district of such agency;

(ii) such agency is making a reasonable tax effort and exercising due diligence in availing itself of State and other financial assistance;

(iii) not less than 50 per centum of the total number of children who were in average daily attendance at the schools of such agency during such fiscal year and for whom such agency provided free public education were, during such fiscal year, determined under either subsection (a) or clause (1) of subsection (b), or both; and

(iv) the eligibility of such agency under State law for State aid with respect to free public education of children residing on Federal property, and the amount of such aid, are determined on a basis no less favorable to such agency than the basis used in determining the eligibility of local educational agencies for State aid, and the amount thereof, with respect to the free public education of other children in the State;

the Commissioner is authorized, to increase the amount computed under paragraph (1) with respect to such agency for such fiscal year to the extent necessary to enable such agency to provide a level of education equivalent to that maintained in such comparable school districts. The Commissioner shall not, under the preceding sentence, increase the amount computed under paragraph (1) with respect to any local educational agency for any fiscal year to an amount which exceeds the product of—

(I) the amount the Commissioner determines to be the cost per pupil of providing a level of education maintained in such comparable school districts during such fiscal year,

multiplied by—

(II) the number of children determined with respect to such agency for such year under either subsection (a) or clause (1) of subsection (b), or both,

minus the amount of State aid which the Commissioner determines to be available with respect to such children for the fiscal year for which the computation is being made.

(C)(i) The amount of the entitlement of any local educational agency under this section for any fiscal year with respect to handicapped children and children with specific learning disabilities for whom a determination is made under subsection (a)(2) or (b)(3) and for whom such local educational agency is providing a program designed to meet the special educational and related needs of such children shall be the amount determined under paragraph (1) with respect to such children for such fiscal year multiplied by 150 per centum.

(ii) For the purposes of division (i), programs designed to meet the special educational and related needs of such children shall be consistent with criteria established under division (iii).

(iii) The Commissioner shall by regulation establish criteria for assuring that programs (including preschool programs) provided by local educational agencies for children with respect to whom this subparagraph applies are of sufficient size, scope, and quality (taking into consideration the special educational needs of such children) as to give reasonable promise of substantial progress toward meeting those needs, and in the implementation of such regulations the Commissioner shall consult with persons in charge of special education programs for handicapped children in the educational agency of the State in which such local educational agency is located.

(iv) For the purpose of this subparagraph the term "handicapped children" has the same meaning as specified in section 602(1) of the Education of the Handicapped Act [20

USCS § 1401(1)] and the term "children with specific learning disabilities" has the same meaning as specified in section 602(15) of such Act [20 USCS § 1401].

(3)(A) Except as is provided in subparagraph (B), in order to compute the local contribution rate for a local educational agency for any fiscal year, the Commissioner, after consulting with the State educational agency of the State in which the local educational agency is located and with the local educational agency, shall determine which school districts within such State are generally comparable to the school district of the local educational agency for which the computation is being made. The local contribution rate for such agency shall be the quotient of—

(i) the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made, which the local educational agencies of such comparable school districts derived from local sources,

divided by—

(ii) the aggregate number of children in average daily attendance for whom such agency provided free public education during such second preceding fiscal year.

(B)(i) The local contribution rate for a local educational agency in any State shall not be less than—

(I) 50 per centum of the average per pupil expenditure in such State, or

(II) 50 per centum of such expenditures in all the States,

whichever is greater, except that clause (II) shall not operate in such a manner as to make the local contribution rate for any local educational agency in any State exceed an amount equal to the average per pupil expenditure in such State.

(ii) If the current expenditures in those school districts which the Commissioner has determined to be generally comparable to the school district of the local educational agency for which a computation is made under subparagraph (A) are not reasonably comparable because of unusual geographical factors which affect the current expenditures necessary to maintain, in the school district of such agency, a level of education

equivalent to that maintained in such other school districts, the Commissioner is authorized to increase the local contribution rate for such agency by such an amount which he determines will compensate such agency for the increase in current expenditures necessitated by such unusual geographical factors.

(iii) The local contribution rate for any local educational agency in—

(I) Puerto Rico, Wake Island, Guam, American Samoa, or the Virgin Islands, or

(II) any State in which a substantial proportion of the land is in unorganized territory, or

(III) any State in which there is only one local education agency, shall be determined for any fiscal year by the Commissioner in accordance with policies and principles which will best achieve the purposes of this section and which are consistent with the policies and principles provided in this paragraph for determining local contribution rates in States where it is possible to determine generally comparable school districts.

(C) For the purposes of this paragraph—

(i) the term "State" does not include Puerto Rico, Wake Island, Guam, American Samoa, or the Virgin Islands; and

(ii) the "average per pupil expenditure" in a State shall be (I) the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made of all local educational agencies in the State, divided by (II) the aggregate number of children in average daily attendance for whom such agencies provide free public education during such second preceding fiscal year.

(e) **Adjustments for decreases in federal activities.** Whenever the Commissioner determines that—

(1) for any fiscal year, the number of children determined with respect to any local educational agency under subsections (a) and (b) is less than 90 per centum of the number so determined with respect to such agency during the preceding fiscal year;

(2) there has been a decrease or cessation of Federal activities within the State in which such agency is located; and

(3) such decrease or cessation has resulted in a substantial decrease in the number of children determined under subsections (a) and (b) with respect to such agency for such fiscal year;

the amount to which such agency is entitled for such fiscal year and for any of the three succeeding fiscal years shall not be less than 90 per centum of the amount to which such agency was so entitled for the preceding fiscal year. That part of any entitlement of any local educational agency which is in excess of the amount which such entitlement would be without the operation of the preceding sentence shall be deemed to be attributable to determinations of children with respect to such agency under subsection (b)(2)(A).

(f) Determinations on the basis of estimates. Determinations with respect to a number of children by the Commissioner under this section for any fiscal year shall be made, whenever actual satisfactory data are not available, on the basis of estimates. No such determination shall operate, because of an underestimate, to deprive any local educational agency of its entitlement to any payment (or the amount thereof) under this section to which such agency would be entitled had such determination been made on the basis of accurate data.

EXCERPT FROM THE GENERAL EDUCATIONAL PROVISIONS ACT

20 U.S.C. § 1232

§ 1232. Regulations

(a) Definition; citation of authority. (1) For the purpose of this section, the term "regulation" means any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Commissioner.

(2) Regulations issued by the Department of Health, Education, and Welfare or the Office of Education, or by any official of

such agencies, in connection with, or affecting, the administration of any applicable program shall contain immediately following each substantive provision of such regulations citations to the particular section or sections.

(b) Publication in Federal Register; opportunity for coment; exceptions; reconsideration; waiver of thirty day period. (1) No proposed regulation prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

(2)(A) During the thirty-day period prior to the date upon which such regulation is to be effective, the Commissioner shall, in accordance with the provisions of section 553 of title 5, United States Code [5 USCS § 553], offer any interested party an opportunity to make comment upon, and take exception to, such standard, rule, regulation, or general requirement and shall reconsider any such standard, rule, regulation, or general requirement upon which comment is made or to which exception is taken.

(B) If the Commissioner determines that the thirty-day requirement in paragraph (1) will cause undue delay in the implementation of a regulation, thereby causing extreme hardship for the intended beneficiaries of an applicable program, he shall notify the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate. If neither committee disagrees with the determination of the Commissioner within 10 days after such notice, the Commissioner may waive such requirement with respect to such regulation.

(c) Uniform application. All such regulations shall be uniformly applied and enforced throughout the fifty States.

APPENDIX D

UNITED STATES OF AMERICA
Before the
DEPARTMENT OF EDUCATION
Washington, D.C.

In the Matter of	
Applications and proposed Amendments thereto for Federal Impact Aid Funds (under Public Law 81-874) for Fiscal Year 1979 by certain sixty-three California Local Educational Agencies	

INITIAL DECISION

Richmond, Virginia
Date: June 5, 1981

David S. Antrobius
Administrative Law Judge

UNITED STATES OF AMERICA
Before the
DEPARTMENT OF EDUCATION

In the Matter of	
Applications and proposed Amendments thereto for Federal Impact Aid Funds (under Public Law 81-874) for Fiscal Year 1979 by certain sixty-three California Local Educational Agencies	: INITIAL DECISION

PARTIES:

The Department of Education

The Applicants:

1. Alpine Union School District
2. Antelope Valley Union High School District
3. Atwater Elementary School District
4. Berryessa Union School District
5. Bonita Unified School District
6. Brentwood Union School District
7. Byron Union School District
8. Center Joint School District
9. Chula Vista City School District
10. Colton Joint Unified School District
11. Cupertino Union School District
12. Escondido Union High School District
13. Folsom Cordova Unified School District
14. Fountain Valley School District
15. Grant Joint Union High School District

16. Grossmont Union High School District
17. Hayward Unified School District
18. Lancaster School District
19. Lassen Union High School District
20. Lemon Grove School District
21. Lemoore Union Elementary School District
22. Livermore Valley Unified School District
23. Los Alamitos School District
24. Los Banos Unified School District
25. Marysville Joint Unified School District
26. Modesto City Schools
27. Napa Valley Unified School District
28. National School District
29. Newark Unified School District
30. North Sacramento School District
31. Novato Unified School District
32. Oakley Union School District
33. Ocean View School District
34. Orcutt Union School District
35. Palmdale School District
36. Placer Union High School District
37. Poway Unified School District
38. Redlands Unified School District
39. Rescue Union School District
40. Rio Linda Union School District
41. Riverside Unified School District
42. Round Valley Unified School District
43. St. Helena Unified School District
44. San Antonio Union School District
45. San Bernadino City Unified School District
46. San Jacinto Unified School District
47. San Juan Unified School District
48. San Pasqual Valley Unified School District
49. San Ramon Valley Unified School District
50. Santa Maria Joint Union High School District
51. Santee School District
52. Soledad Union School District

53. South Bay Union School District
54. Surprise Valley Joint Unified School District
55. Susanville School District
56. Sweetwater Union High School District
57. Vallejo City Unified School District
58. Valley Center Union School District
59. Vista Unified School District
60. Walnut Creek School District
61. Westside Union School District
62. Wheatland School District
63. Wheatland Union High School District

APPEARANCES:

John R. Mason for the Department of Education.
John Gomperts - Law Clerk
Mary Brusewitz - Law Clerk (on brief)

Donald Jay Solomon representing twenty-four California Local Educational Agencies.

Grant C. Pinney representing eleven California Local Educational Agencies.

Greer D. Knopf representing ten California Local Educational Agencies.

W. Craig Biddle representing two California Local Educational Agencies (not present at the hearing).

Gloria M. Beutler representing one California Local Educational Agency.

Clifford D. Weiler representing one California Local Educational Agency.

BEFORE: David S. Antrobius, Administrative Law Judge.

THE PROCEEDINGS

This proceeding was instituted pursuant to Public Law 81-874[1] and the appropriate regulations as contained in 45 CFR, sections 111.1 - 111.10.[2]

Requests for hearing were filed by sixty-four California Local Education Agencies (Applicants or LEA's) with the Department of Education (the Department) relating to their applications and amendments thereto filed with the Department for financial assistance for fiscal year 1979 (FY 1979). One Applicant[3] asked for withdrawal of its request for hearing on February 19, 1980. The other requests for hearing were consolidated. Three Applicants[4] also asked for withdrawal of their requests for hearing between March 19 and September 25, 1980. Two Applicants[5] later indicated their desire to withdraw their requests. All six requests were dismissed without objection at the time of hearing. Of the fifty-eight remaining Applicants participating in the hearing process, forty-nine were represented by counsel.

As part of the post-hearing procedures, filings of proposed findings, conclusions, and supporting briefs were submitted.

The findings and conclusions herein are based upon the preponderance of the evidence from the record and from observation of the witnesses.

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[1] 20 U.S.C. 236-244.

[2] 45 CFR, section 111.2 provides in pertinent part:

"(a) Any applicant whose application under Pub. L. 815 or Pub. L. 874 is disapproved by the Commissioner, or his delegatee, in whole or in part, or which is dissatisfied with the Commissioner's action, or failure to act (or that of his delegatee), upon its application under such public laws shall be entitled to a hearing thereon."

[3] Needles Unified School District.

[4] Ocean View School District, Center Joint School District, and San Antonio School District.

[5] Bonita Unified School District and Grant Joint Union High School District.

ISSUES

The general framework of issues in this matter is as follows:

1. As submitted, were local contribution rates of each of the fifty-eight LEA's prohibited under the law or otherwise?

2. Did the Department waive its right or is it estopped from reducing, cancelling, rejecting, or nullifying the amendments/revisions to any of the seven LEA's applications it initially allowed?

3. Did the Department act in such a way as to estop it from, or waive its right to reject the applications of the other fifty-one LEA's?

4. Were the LEA's afforded due process of law and equal protection under the law in this matter? If this issue is not within the scope of this proceeding, did the Department treat the Applicants in an equitable manner?

FINDINGS OF FACT

The program at issue is generally known as School Assistance in Federally Affected Areas (SAFA), or "Impact Aid." Prior to May 4, 1980, the program was administered within the Department of Health, Education, and Welfare (HEW) and its Office of Education through its Commissioner of Education. The program is now administered within the new Department of Education, which was created by the Department of Education Organizational Act.[1] The duties and functions of the former Commissioner of Education were transferred to the Secretary of Education. All rules and regulations which were in effect prior to the creation of the Department of Education have continued in effect.

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[1] Public Law (P.L.) 96-88.

The Federal Impact Aid Program is implemented pursuant to P. L. 81-874, which was approved on September 30, 1950. That legislation has been amended and is now embodied within 20 U.S.C., sections 236-244.[2] That law provides for financial assistance to LEA's burdened by Federal activities which reduce the local tax base or increase the number of children attending the schools of that agency.[3]

Generally, these are children who are connected to activities of the Federal Government because they reside on Federal property, live with a parent employed on Federal property, or have a parent in the uniformed services. Various categories of federally-connected children are described more precisely in sections 3(a) and 3(b) of P. L. 81-874, 20 U.S.C. 238. Children described in section 3(a) are commonly called "A" children. Children described in section 3(b) are commonly called "B" children.

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[2] This legislation has been amended, in part, by P.L. 83-248, P.L. 84-949 (August 3, 1956, section 205; 70 Stat. 970, 971), P.L. 85-620, section 202 (72 Stat. 559), P.L. 89-750 and P.L. 90-137.

[3] "TITLE I--FINANCIAL ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITY

DECLARATION OF POLICY

Section 1. In recognition of the responsibility of the United States for the impact which certain Federal activities have on the local educational agencies in the areas in which such activities are carried on, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following sections of this title) for those local educational agencies upon which the United States has placed financial burdens by reason of the fact that -

(1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or

(2) such agencies provide education for children residing on Federal property; or

(3) such agencies provide education for children whose parents are employed on Federal property; or

(4) there has been a sudden and substantial increase in school attendance as the result of Federal activities."

The law provides that to apply for assistance, a local educational agency must submit an application on Form RSF-1 (entitled "Application for School Assistance in Federally Affected Areas") to its appropriate state educational agency. That agency certifies the application, and then forwards it to the Department of Education. Regulations establish, subject to certain exceptions, that January 31 of the appropriate fiscal year is to be the filing date for the Department's receipt of applications.[4] During FY 1979, the Department processed approximately forty-three hundred applications for payment under P.L. 81-874.

The "Impact Aid" Program as a general proposition provides to an eligible LEA an entitlement that is computed as follows:

Number of federally-connected children (as defined more precisely in Sections 3(a) and 3(b) of P.L. 81-874) in the LEA's average daily attendance[5]	X	Local Contribution Rate	=	Entitlement

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[4] 45 CFR 115.11.

On November 21, 1980, 45 CFR Part 115 was redesignated as 34 CFR Part 222. 45 Fed. Reg. 77368. However, because these regulations have not yet been published in their renumbered form, for convenience of reference, citations to the regulations are as they were numbered in 45 CFR.

[5] P.L. 81-874 provides, in pertinent part:

"Section 3. (a) For the purpose of computing the amount to which a local educational agency is entitled under this section for any fiscal year, the Commissioner shall determine the number of children who were in average daily attendance at the schools of such agency, and for whom such agency provided free public education, during such fiscal year, and who, while in attendance at such schools, resided on Federal property *and* -

(1) did so with a parent employed on Federal property situated (A) in whole or in part in the county in which the school district of such agency is located, or (B) if not in such county, in whole or in part in the same State as the school district of such agency; or

* * * * * *

The Regulations permit computation of local contribution rates through group rates or individually selected comparable district rates. The method of computing a local contribution rate is prescribed by statute and regulation.[6] Legislation also provides for increases in LEA's local contribution rates under certain circumstances. The Department pays different percentages of an

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(Footnote 5 continued:)

"Section 3. (b) For the purpose of computing the amount to which a local educational agency is entitled under this section for any fiscal year ending prior to October 1, 1983, the Commissioner shall, in addition to any determination made with respect to such agency under subsection (a), determine the number of children (other than children with respect to whom a determination is made for such fiscal year under subsection (a)) who were in average daily attendance at the schools of such agency, and for whom such agency provided free public education, during such fiscal year and who, while in attendance at such schools, either -

(1) resided on Federal property, or

(2) resided with a parent employed on Federal property situated (A) in whole or in part in the county in which the school district of such agency is located or in whole or in part in the school district of such agency if the school district is located in more than one county, or (B) if not in such county or district, in whole or in part in the same state as the school district of such agency, or

(3) had a parent who was on active duty in the uniformed services (as defined in section 101 of title 37, United States Code.)

[6] P.L. 81-874, section 3(d)(3)(A) provides, in pertinent part:

"Except as provided in subparagraph (B), in order to compute the local contribution rate for a local educational agency for any fiscal year, . . . shall be the quotient of -

(i) the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made, which the local educational agencies of such comparable school districts derived from local sources,

divided by -

(ii) the aggregate number of children in average daily attendance for whom such agency provided free public education during such second preceding fiscal year."

See also 45 CFR 115.30, 115.31, and 115.32.

LEA's local contribution rate for children in various categories.[7] An LEA's entitlement and priority for funding might be affected in the event Congress appropriates only a portion of the funds that are legally authorized for the Impact Aid Program.[8]

The State of California used a group rate method until FY 1977, at which time its LEA's were converted to the individually selected comparable district method. With regard to determining comparability for this method and calculation of local contribution rates, the Department had been using a criterion commonly called the "$50 rule." This rule has been used by the Department since a point in time in the early 1950's. The "$50 rule" is not within the text of Public Law 81-874, as amended, nor is it within the Department's published rules and regulations. The "$50 rule" was applied as a Departmental guideline, or tolerance, and it was not exact in nature. This rule has been described as meaning that an LEA's local contribution rate based on individually selected comparable districts would not exceed $50 above that LEA's "local effort" per non-federally connected pupil. The purpose of the rule is to confine the amount of money paid on a per pupil basis to that which an LEA would have raised from local resources for non-federally connected pupils had the Federal Government not imposed a burden upon the LEA, whether by the presence of land and/or children.

The Department has taken the position that under the "$50 rule", "local effort" is calculated as follows:

Total revenues for current expenditures from local sources	=	Local effort for non-federal children
(divided by)		
Non-federal children in average daily attendance		

[7] P.L. 81-874, section 3(d)(1).

[8] P.L. 81-874, section 5(c).

Further, that "total revenues for current expenditures from local sources," a factor in the formula stated above, is the product of:

Tax Resources (Assessed valuation)	X	Tax effort (Tax Rate for Current Expenses)	=	Total revenues for current expenditures from local sources

In essence, with regard to application review, the "$50 rule" was used as a measure to determine if LEA's (cited as being comparable) were, in fact, generally comparable to the applicant. This rule is not applicable to the group rate of calculation. Whichever method is used, the law provides for minimum rates.[9]

In examining the applications for "Impact Aid" in FY 1978, the Department applied the "$50 rule" and also used a grid or checkerboard, requiring comparability of applicants (with the prescribed number of LEA's) as to five of fourteen criteria. Those criteria included such areas as legal classification; total average daily attendance (ADA); cost per pupil paid from local and all sources; grade levels maintained; percent of pupils transported; pupil-teacher ratio; assessed valuation per pupil; ratio of assessed value to true value; tax rate for current expenses and for all school purposes; curricula offered; teacher salary; and economic characteristics.[10]

A report was prepared by the Department summarizing its position as to certain General Accounting Office recommendations as of October 11, 1977. On March 3, 1978, a memorandum was

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[9] The minimum local contribution rate for an LEA within the State of California for FY 1979 was $792.09, which represented 50% of the average per pupil expenditure within the state.

[10] The grid itself contained 12 classifications, but 14 criteria.

forwarded to and received by Maintenance and Operations analysts and section chiefs from the Chief of the Maintenance and Operations Branch of the Division of School Assistance in Federally Affected Areas (DSAFA). That memorandum concerned approval of local contribution rates on the basis of individually selected comparable districts.

On or about October 9, 1978, employees of the Department met with representatives of the California State Educational Agency (CSEA) regarding, in part, workshop presentations dealing with P.L. 81-874 funds and applications. Included within the purview of the meeting and discussions were interpretations by California state officials regarding selections and calculation of comparability factors for LEA's. Shortly thereafter, on November 6, 1978, Mr. Joe Nolan, a state representative, presented a workshop. Certain of the Department's employees were in attendance and state officials spoke to the subject of comparability, calculations, selections of districts for purposes of comparability, and computation of local contribution rates. Workshops were also conducted by Mr. Nolan throughout the State of California during the fall of 1978. In May 1979, the San Diego County Department of Education notified all county school districts that a workshop would be held in June 1979, regarding the possibility of filing revised Impact Aid applications for fiscal year 1979. At this workshop, representatives of the applicant school districts within San Diego County were informed that Applicants who had previously used the statewide average as their local contribution rate on their "Impact Aid" applications could now utilize the comparable district method of computing their local contribution rate.

FY 1979 extended from October 1, 1978, through September 30, 1979. At a point in time during 1979, the Department ceased to apply the "$50 rule" to applications for "Impact Aid," but continued to use the aforementioned grid (with ranges). For FY 1980, the Department advised applicants in writing that the "$50 rule" would be in effect, but the rule might be exceeded if there was written justification.

On April 9, 1979, an instructionary document was transmitted to Maintenance and Operations analysts for DSAFA and others from the Acting Chief of the Maintenance and Operations Branch, regarding criteria for LEA's local contribution rates for FY 1979. That letter required the use of the grid and comparability of applicants as to other LEA's within five of the said fourteen criteria. That document did not specify or require the use of the "$50 rule" as a mandatory criterion. On that same day, the Director of DSAFA sent memorandums to the Applicants, advising that the initial payment for school year 1978-1979, accompanied by a voucher, would soon be forthcoming. That transmittal stated that actual processing of applications for FY 1979 would be completed by June 30 of that year.

All LEA's in this proceeding received "Impact Aid" payments on the basis of their original applications. The amended applications now before me for FY 1979 seek approximately $12,279,000.00 in additional "Impact Aid" funds. A number of LEA amended applications containing revised local contribution rates were received through June 19, 1979, and approved by the Department. The criteria specified in the memorandum of April 9, 1979, were applied, and the "$50 rule" was not imposed as an absolute requirement. Amended applications from eight California LEA's (seven of which are parties to this proceeding) were approved during April, May, and June 1979. Certain LEA's were actually paid additional "Impact Aid" funds based on their amended applications. Estimated additional funds[11] which would have accrued to those LEA's based on the amendments are shown to be:

Chula Vista City School District	$329,000.00 (first amended application)
Lemon Grove School District	49,029.94
Rio Linda Unified School District	122,539.41

[11] Exhibit E-18.

San Bernardino City Unified School District	545,069.49
San Pasquale Unified School District	103,808.43
South Bay Unified School District	242,467.76
Vista Unified School District	195,216.13.[12]

Proposed rules were published on June 29, 1979, in the *Federal Register*,[13] concerning the Federal Impact Aid Program. Some time in early July 1979, the Director of DSAFA learned that some amended applications had been accepted and processed by program analysts, with resulting increased local contribution rates and higher "Impact Aid" payments. On or before July 9 of that year, he made a decision to deny the amended applications of the LEA's party hereto, on the grounds that their local contribution rates were improper under the Regulations, and, further, that the amended applications were filed after the deadline date.[14] On July 26, 1979, the Acting U.S. Commissioner of Education published in the *Federal Register*[15] an announcement regarding extension of filing dates for FY 1979 "Impact Aid" applications[16] under certain circumstances.

There was an inquiry by an elected Federal official as early as July 26, 1979, and the possibility of some irregularity in the program was raised at that time. The Stipulations of Fact in this case

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[12] Monterey Peninsula was one of the eight California LEA's initially approved, and the Department estimated that the amended application would have increased that LEA's Impact Funds by $3,245,113.91. Monterey Peninsula did not request a hearing and is not a party to this matter.

[13] Volume 44, No. 127 (38184 ff.).

[14] Exhibit E-5.

[15] Volume 44, No. 145, pp. 43807-43808.

[16] The Department does not now assert any defense based on application filing deadlines in this proceeding under the Regulations as contained in 45 CFR, Section 115.11. This stipulation also includes defenses based upon timeliness and any other defenses available to the Department under that Regulation.

show that on August 30, 1979, the Associate Commissioner of Education delivered a written request for an investigation to the Office of the Inspector General. Beginning in approximately September 1979, letters from other elected Federal officials were sent to the Department, expressing, among other things, concerns regarding the Department's failure to process and fund revised "Impact Aid" applications of LEA's for FY 1979. A report was prepared on September 10, 1979, (by the Director DSAFA) entitled, "California: 1979 Local Contribution Rate, Consultant Problem." A transmittal of September 17, 1979, from the Associate Commissioner of Education to the Assistant Secretary related that amended applications were processed and certain districts paid in error. He reflected that the amendments were accepted and processed because of misinterpretation by some members of the DSAFA staff. The impetus for filing at least some of the amended applications apparently, according to the transmittal, stemmed from a premature discussion with, or disclosure to, a private consultant and/or LEA applicants as to the details of an experimental policy that had not yet been declared established policy of the Department.

The Director of DSAFA, on October 12, 1979, directed a memorandum to CSEA officials and LEA representatives noting that, by earlier correspondence, they had been advised that the amended applications in question would not be accepted.

The Department has stipulated that if the Applicants do prevail in this proceeding, money would be available for increased "A" and "B" entitlements.[17]

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[17] P. L. 81-874, sections 3(a) and 3(b).

EVALUATION OF THE EVIDENCE AND CONCLUSIONS OF LAW

I find that I am not empowered to declare the Department's actions in this matter to be unconstitutional. That is not a matter of jurisdiction for an administrative court. Neither the Administrative Procedures Act nor the regulations governing this hearing authorize me to pass on such a question. As a matter of law, a Federal agency, such as the Department, has "neither the power nor the competency to pass on the constitutionality of administrative or legislative action."[18] Therefore, I cannot find that the "$50 rule," as historically applied, is unconstitutional.

The "Impact Aid" regulations are promulgated under the Administrative Procedures Act (APA) and the General Education Provisions Act (GEPA).[19] Regulations authorize the Secretary to determine those Districts that are "generally comparable"[20] to an applicant, with focus on factors relating to tax resources and tax effort. Accordingly, I find that the regulations expressly authorize

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[18] *Murray v. Vaughan*, 300 F. Supp. 688, at 695 (D.R.I. 1969). *See, e.g., Oesterich v. Selective Board*, 393 E.S. 233, 242 (1968); *Public Utilities Comm'n of State of California v. United States*, 355 U.S. 534, 539 (1958).

[19] 5 U.S.C. section 551 ff, 20 U.S.C. section 1232.

[20] 45 CFR Part 115, section 115.30(b)(2), states in pertinent part:

> "*The selection by the applicant of such local educational agencies shall* be based on the criteria set forth in paragraphs (a)(1) through *(a)(10) of this section .... The Commissioner's determination will be based upon such criteria and any other relevant factors.* The financial attendance, and other data of the selected local educational agencies must be sufficient to justify the selection of such local educational agencies as generally comparable (to the applicant) and to determine the per pupil expenditures and the local contribution rates in such agencies. On the basis of the data furnished by the applicant, or information otherwise obtained, and *applying the above criteria, the Commissioner will select those local educational agencies which he determines to be generally comparable to the applicant . . .*" (Emphasis supplied.)

the Secretary to make the type of comparison that takes place under the "$50 rule" in deciding whether to approve an LEA's local contribution rate.

I do not find that the "$50 rule" is invalid because it was never promulgated as a regulation or published in the *Federal Register*. The notice and comment rule making requirements contained in the APA and GEPA do not apply to internal agency practices or procedures which the agency staff utilizes in applying the provisions of the statute or regulation. Rule making requirements of the APA apply only to substantive rules.[21] I find the "$50 rule" to be interpretive in nature.

The "$50 rule" measures factors of tax resources and tax effort accurately, insofar as only an applicant's non-Federal children are taken into account in calculating the applicant's "local effort." This calculation also measures the LEA's ability and willingness to tax itself without reference to Federal impact. Formulation and use of this rule in the past has been a valid and proper guideline to equalize "Impact Aid" payments to LEA's and to prevent windfall payments under the program.

Testimony reflects that the "$50 rule" has existed and been in use since some time in the early 1950's, and that over the years, due to economic conditions, the initial valuation of $50 would have a present day value of at least $150. I find that the Department should raise the "$50 rule" to a more realistic monetary limitation. Moreover, while I have held that publication is not mandatory, I nevertheless find that this rule is an important factor

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[21] 5 U.S.C. section 553 applies only to substantive rules and explicitly does not apply:

"(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ."

See also: *American Meat Institute v. Bergland*, 459 F. Supp. 1308, 1314 (D.D.C. 1978); *Ranger v. F.C.C.*, 294 F.2d 240, 244 (D.C. Cir. 1961); *Commonwealth of Pennsylvania v. United States*, 361 F. Supp. 208 (M.D. Pa.), *aff'd*, 414 U.S. 1017 (1973).

in processing "Impact Aid" applications. The public and the educational community in particular would be better served to know this information. Therefore, in the interest of good management and fairness, I further find that the Department should take the steps necessary to publish the "$50 rule" under the Law.

The question now arises as to whether the Department is estopped; has waived its right; or, is otherwise prevented from disapproving the Applicants' amendments or revisions to their applications for "Impact Aid" for FY 1979. Generally, the United States Government is not estopped by acts of its officers or agents who act without authority. Those dealing with an agent of the United States Government must be on notice of limitations of authority. Estoppel cannot be invoked as a means of successfully avoiding the requirements of legislation enacted for the protection of public interest.

Nevertheless, acts of Government employees, if they are authorized to bind the United States Government, and if they have acted within the scope of their authority, will work an estoppel if public interest would not be unduly damaged.[22] When an agency of the United States Government acts lawfully and in accordance with its authority, the public should be able to rely fully and with confidence on that action. The trend in court decisions is that estoppel as an equitable doctrine ". . . may properly concern itself with essential fairness to the private citizen dealing with his government through its officers and agents, so long as the application of the doctrine does not infringe upon the government's paramount responsibility to represent all of the people[23]. . ."

The Department cites *Utah Power and Light v. United States*, 243 U.S. 389 (1917), as the original authority that the United States is neither bound nor estopped by acts of its officers or

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[22] *Walsonavich v. U. S.* (3rd Cir. 1964) 335 F.2d 96, 101.

[23] 21 ALR Fed. 702.

agents. The doctrine of estoppel against a governmental entity has evolved since that decision was issued. The elements of estoppel against the government were articulated by the court in *United States v. Ruby*, 588 F.2d 697 (9th Cir. 1978) as follows:

> "(1) The party to be estopped must know the facts;
>
> (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
>
> (3) The latter must be ignorant of the true facts; and
>
> (4) He must rely on the former's conduct to his injury."

In *United States v. Georgia-Pacific C*[illegible]. (9th Cir. 1970) 421 F.2d 92, 95, the court noted that immunity from estoppel against the government is clearly obsolete due to the expansive role of government in society. The court concluded that the typical four-pronged test for estoppel should apply to a governmental entity as it would to any private party. In this regard, it was stated in *United States v. Lazy FC Ranch* (9th Cir. 1973) 481 F.2d 985 as follows:

> "We think the estoppel doctrine is applicable to the United States where justice and fair play require it. The Supreme Court applied this rationale in *Moser v. United States*, 341 U.S. 41, 95 L.Ed. 729 (1951)."

The court apparently relied on "basic notions of fairness" in permitting estoppel against the Federal government. Further, it is evident that a long line of cases establish the proposition that:

> ". . . estoppel is available as a defense against the government if the government's wrongful conduct threatens to work

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[23] 21 ALR Fed. 702

> a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. (Citation.) This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) . . . See *Georgia-Pacific, supra.* (*United States vs. Lazy FC Ranch, supra*, 481 F.2d 985 at 989.)"

I find in this matter that during the period of time under consideration during FY 1979 and when the "$50 rule" was not used by the Department as a mandatory criterion, its agents were authorized to approve the Applicants' amended applications and the government could be estopped from denying those approvals if all necessary elements of estoppel are factually present and if public interest would not be unduly damaged.

While I do not have the authority to rule on the constitutionality of the Department's actions, I do find that it did not treat certain Applicants in this matter in an even-handed fashion. I was impressed by the knowledge and apparent dedication of the Department's witnesses; however, it is clear from the record that the Department has been remiss in this matter with regard to certain internal and external coordination and communication. The failure to publish the "$50 rule" under the law has led to confusion on the part of the CSEA, LEA's, and, internally, within the Department itself. Further confusion resulted following the memorandum of April 9, 1979, from the Acting Chief of Maintenance and Operations Branch to analysts and others. That transmittal was endorsed by the Director of DSAFA, and it speaks for itself. From on or about that date until early July 1979, the "$50 rule" was not a mandatory criterion, with regard to approval of LEA applications for "Impact Aid."

As noted, the Department's historical use of the "$50 rule" has been a matter of agency discretion. The application of that rule is not mandated by statute or regulation. Testimony of certain employees of the Department indicates that it was not the

Department's intent to eliminate the "$50 rule" as a mandatory criterion during the aforesaid period. I do not find these allegations to be convincing. The testimony of the Director of DSAFA supports my conclusion. Moreover, a letter dated in August 1979[24] addressed to him from the Chief of the Maintenance and Operations Branch of that division states in pertinent part:

> "Policy memo dated April 9, 1979 from Acting Chief, M&O Branch. The memo is incomplete. In the first paragraph, it talks about the criteria sheet includes (sic) 5 items used to measure comparability. (It reports 12). The five *no longer* has (sic) to include any particular one. This memo made my policy memo of March 3, 1978, no longer valid (treat the amount raised locally per non-Federal child as a critical factor). . . ."
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> * * * * * *
>
> "In summary, the accusations made are absolutely correct. *Policy was changed.*" (Emphasis supplied.) "California officials were told that the "Pupil Load" was a good guide. They screened applications accordingly. However, the policy memo dated April 9, 1979. . . . no longer stated this, but that the district must meet five, any five. . . ."
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> * * * * * *
>
> "I would like to make one point and that is Mrs. Cooper makes it very clear that the policy changes was (sic) agreed upon by you."

I find this evidence to be particularly pertinent and revealing.

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[24] Exhibit ALJ-5, Cooper Al.

While estoppel directed to a Government agency must be applied sparingly, the peculiar circumstances in this case would necessitate the application of that doctrine if all essential elements are proven. In order for the Applicants to establish estoppel, their evidence must show that they had actually been misled in reliance on the conduct of the Department, and prejudiced, injured, or damaged by the acts and conduct of or attributable to the Department. There is no substantial evidence of such detriment in this matter as to those Applicants (51) whose amended applications for "Impact Aid" during FY 1979 were not approved. The amendments were never processed and the Applicants did not receive any official written or oral approval of those filings. None of the said 51 Applicants received a voucher from the Department indicating that the Applicant would be receiving a higher local contribution rate than that requested in the original "Impact Aid" application. The evidence did not reflect that any of the 51 Applicants financially obligated themselves or otherwise changed their positions in any way to their detriment in expectation of receiving additional "Impact Aid" based on their amended applications. Therefore, the Department is not estopped from disallowing those amended applications. The seven approved amended applications of the LEA's party to this action must be reckoned with and constitute a different matter.

San Pasquale Valley Unified School District received initial approval of its amended application, but that approval was reversed by the Department on September 7, 1979. Earlier, officials of the school district made a decision to air condition a high school at a cost of $110,000. Testimony indicated, however, that the additional "Impact Aid" funds were never actually received and no monetary expenditure was actually made based upon that expectation.[25] Accordingly, the Department need not allow this LEA's amended application within the context of this case.

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[25] Transcript, p. 1053.

Rio Linda Union School District received approval of its amended application on June 16, 1979. Testimony at the time of the hearing was clear and direct that this school district did not suffer any detriment, nor did it change its position based on expectation of additional "Impact Aid" funds.[26] The director of Business Services for Rio Linda United School District could not testify that this LEA changed its position in reliance upon the belief that these funds would be forthcoming.

San Bernardino City Unified School District received approval of its amended application on May 30, 1979. Prior thereto, negotiations had been underway between the LEA and an employee's union. A settlement was made with the union on May 3, 1979. Testimony by the Assistant Superintendent for Administration of the LEA indicated that the possibility of receiving the additional "Impact Aid" funds was a strong factor in making that settlement. However, this LEA was only "aware of the . . . probability" of the additional funds, which were not included in the LEA's tentative budget until July 1979. Testimony that this LEA suffered detriment due to approval of a union contract (prior to the date of the approval of its amended application) is without merit and speculative at best.[27] A party who asserts an estoppel has the burden of proof and must show the grounds upon which it rests. The proof, in this instance, is not certain, but left to mere intendment and inference.

It is the decision of the Administrative Law Judge that the Department is not required to approve the amended applications for Rio Linda Union School District, San Pasquale Valley Unified School District, and San Bernardino City Unified School District, as these LEA's did not prove that they had been prejudiced, injured, or damaged by the acts and conduct of the Department.

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[26] Transcript, pp. 1354, 1355.

[27] Transcript, p. 1067 ff.

The amended applications of the four remaining LEA's should be approved by the Department, insofar as their proof in this case meets all requirements of law. Lemon Grove School District, South Bay Union School District, and Vista Unified School District all made specific and certain settlements with employee unions or organizations in reliance upon the approval of their applications by the Department and the expected revenue due them from the additional "Impact Aid" funds.[28] I find clear and convincing, as well, that Chula Vista City School District also suffered detriment, as additional school programs were budgeted and instituted, again in reliance upon the approval of its initial amended application and the expectation of additional "Impact Aid" funds.[29] The evidence was somewhat lacking in specificity, but, nevertheless, was uncontradicted. This LEA requested a minimum payment in its application. It filed its first amendment on May 29, 1979. That application was approved orally and in writing by the Department within the time frame when the "$50 rule" was not a mandatory criterion. A second amended application was filed in September 1979, when the "$50 rule" again was mandatory and in use and effect by the Department. The second amended application did not meet the Department's criteria, but I find that the Department must allow payment based upon Chula Vista City School District's amended application filed on May 29, 1979.

The record also shows that payment of the additional "Impact Aid Funds" to these four LEA's based upon their said amended applications for FY 1979 would not cause irreparable harm or infringe upon the Government's paramount responsibility to represent all of the public.[30] The Department's argument that these Applicants actually relied upon the expectation of lesser amounts of "Impact Aid" funds to their detriment is without merit.

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[28] Transcript, pp. (1198 ff) (1295 ff) (1384 ff).

[29] Transcript, p. 1175 ff.

[30] Transcript, p. 339 ff.

Antelope Valley Union High School District filed its initial application, and then filed an amended application after being advised that the initial one was incorrect. The amended application, which was filed on January 9, 1979, was accepted, but later disapproved. This LEA's difficulty arose primarily due to revision downward of its local contribution rate in the initial application due to handling with the California State Department of Education, and not because of any action on the part of the Department. The evidence indicates that the expected additional funds were included as general income in the tentative school budget for the 1978-1979 school year. Those funds, however, were deleted, and not included in that LEA's final budget. There is no evidence of any change of position or detriment on behalf of Antelope Valley Union High School District, and the Department need not approve its amended application.

All proposed findings and conclusions submitted by the parties have been considered as to their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

INITIAL DECISION

It is the decision of the Administrative Law Judge that Lemon Grove School District, South Bay Union School District, and Vista Union School District are entitled to "Impact Aid" under P.L. 81-874 for FY 1979, based on those LEA's amended applications. Chula Vista City School District is entitled to "Impact Aid" under P.L. 81-874 for FY 1979, based on its amended application filed on May 29, 1979.

It is the further decision of the Administrative Law Judge that the remaining fifty-four California LEA's which are parties to this proceeding are not entitled to "Impact Aid" based on their amended applications under P.L. 81-874 for FY 1979. These parties are entitled to those funds based only upon their intitial applications.

David S. Antrobius
Administrative Law Judge

Date: June 5, 1981

APPENDIX E

FILED
ENTERED
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RECEIVED
DEC 14 1982
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY Deputy

FILED
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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA CITY SCHOOL DISTRICT, Plaintiff, v. T. H. BELL, Defendant.	Civil No. 81-1065-S(H)
POWAY UNIFIED SCHOOL DISTRICT, et al., Plaintiffs, v. T. H. BELL, Defendant.	Civil No. 81-1182-S(M) **ORDER AND JUDGMENT**

This cause came on to be heard on the motions of the plaintiffs and the defendant for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court, having considered the moving and opposing papers, the oral arguments, and

the entire record of this matter, ORDERS, ADJUDGES and DECREES as follows:

1. As used herein, the following terms have the following meanings:

a. "LEA" means local educational agency.

b. "Plaintiff" means every LEA listed on Exhibit A to the Stipulation and Order dated May 11, 1982, including the named plaintiffs herein.

c. "Department" means the Department of Education.

d. "Section 3 Assistance" means the financial assistance that defendant pays to certain LEA's pursuant to 20 U.S.C. §238.

e. "Amended Application" means the second amended application for Section 3 Assistance that the Chula Vista City School District filed for Fiscal Year 1979 and the first amended application for Section 3 Assistance that every other plaintiff in the above consolidated action filed for Fiscal Year 1979.

f. "Allegedly Comparable District" means a school district listed in Tables 10a and 10b of an Amended Application.

g. "Applicant's District" means a school district administered by any of the plaintiffs.

h. "Local Contribution Rate" has the meaning it has in 20 U.S.C. §238(d)(3).

i. "Grid" means the form containing a set of 14 criteria (and the ranges pertinent thereto) that the Department used in connection with its review in 1979 of certain applications for Section 3 Assistance for Fiscal Year 1979. A copy of the Grid is attached as Exhibit A.

2. The terms of the Court's oral opinion of September 20, 1982 are incorporated by reference herein, including the following: "The fifty-dollar rule is invalid as applied to the applications of the various plaintiffs in this case and for Federal impact aid." A copy of the aforesaid opinion is attached as Exhibit B.

3. The motions of the plaintiffs for summary judgment are granted.

4. The motion of the defendant for summary judgment is denied.

5. Judgment is granted in favor of plaintiffs.

6. Within 45 days of the date of this Order, the Department shall review each Amended Application and determine whether the Allegedly Comparable Districts named therein are "generally comparable" to the Applicant's District to which such Amended Application pertains.

7. The Department shall recompute a plaintiff's Local Contribution Rate for Fiscal Year 1979 (and, after taking appropriate steps to insure the availability of funds, shall direct the Treasury to pay that plaintiff the appropriate amount of additional Section 3 Assistance) if it finds that at least two of the Allegedly Comparable Districts in the plaintiff's Amended Application are "generally comparable" to the plaintiff's school district. The Department will base its recomputation of the plaintiff's Local Contribution Rate on the Allegedly Comparable Districts which it finds to be "generally comparable" to the plaintiff's district, in accordance with Paragraph 8 below.

8. The Department will find a particular Allegedly Comparable District to be "generally comparable" to a particular Applicant's District if and only if each of the following was true for Fiscal Year 1977:

a. The Allegedly Comparable District matched the Applicant's District with respect to Items 1 and 4 in the grid, and

b. The Allgedly Comparable District matched the Applicant's District with respect to any three of the other twelve items in the grid.

9. The compliance of the Department with Paragraphs 6 and 7 of this Order is stayed pending appeal.

DATED: DECEMBER 10, 1982.

Judge of the District Court

GRID USED IN FISCAL YEAR 1979

Comparable Districts
Submitted in Table 10A

	a.	b.	c.	d.	e.
1. Legal Classification					
2. Total ADA ± 15%					
3. Cost per pupil					
a. Paid from local sources ± $150					
b. Paid from all sources ± $150					
4. Grade levels maintained					
5. Percent of pupils transported ± 10%					
6. Pupil-teacher ratio ± 5					
7. Assessed valuation per pupil ± $10,000					
8. Ratio of assessed value to true value ± 10%					
9. Tax Rate					
a. For current expenses ± 10%					
b. For all school purposes ± 10%					
10. Curricula offered					
11. Teacher's salary ± $5,000					
12. Economic characteristics					

E-6

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA CITY SCHOOL DISTRICT, et al., Plaintiff, vs. T. H. BELL, SECRETARY OF EDUCATIION, Defendant.	No. 81-1065 S (H) No. 81-1182-S (H)

BEFORE THE HONORABLE EDWARD SCHWARTZ

September 20, 1982

BEFORE: KAREN F. DIX, CSR

THE COURT: I'd like to take about five minutes and then I will give you a decision from the bench.

(Whereupon a recess was taken, after which the following proceedings were had:)

THE COURT: All right. The Court here has before it cross motions for summary judgment. It's obvious that the problem that is presented is one that arises from a less than ideal handling of a Federal impact program by the Department of Education. It's apparent from the history, which I'm not going to go into again in detail, and from the admissions made here in the courtroom today, that this program has not been administered with precision. It has been fraught with a great deal of uncertainty, and some mistakes. The result is that these various school districts have filed applications for impact aid specifically with regard to the year 1959 -- 1979, that has resulted in a great deal of confusion and uncertainty.

The plaintiffs in this case are moving for summary judgment and asking the Court to set aside the use of the so called fifty dollar rule on various principal grounds that fall into roughly three categories.

First, on the ground that there's been a failure to publish notice in the Federal Register, as required by the administrative procedure act under Section 552 (a)(1) and 553 of 5 United States Code.

Secondly, plaintiffs allege a failure to follow other notice requirements of rule making procedures; and thirdly, plaintiffs attack the fifty dollar rule and assert its invalidity by reason of failure of the Department to comply with mandates of the impact aid statute, namely, 2 United States Code Section 238 D.

Now, particularly with regard to the failure for public notice and to conduct hearings or opportunities for public comment, a

number of subsidiary attacks are made, but I think they can all be considered under one general grouping.

With regard to the failure to publish, Section 553 of Title 5 United States Code, specifically, I think, exempts or excepts grants from the notice requirements. I'm not going to read consecutively through the section, but the pertinent language 553 A provides in part, "This Section applies, according to the provisions thereof except to the extent that there is involved a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts."

Now, in a District of Columbia Circuit case, which is National Wildlife versus Snow, 551 Federal 227 it was held that the grant regulations were excepted from notice requirements; and I think it is interesting to note that in that case the Court on page 231 of its decision while it holds that grants are excepted from the public notice requirements, indicates its concern that matters as important as grants are not under the statute subjected to notice and an opportunity to comment on the part of the public.

The Court says in part, "As a matter of policy, Congress might have done better to anticipate that the federal grant and benefit programs the government would come to administer would have a direct policy impact on individual citizens and society as a whole. Its desire that legislative functions in administrative agencies be exercised only upon some form of public participation after notice might better have been served by recognizing that spending money always involves public choices, often significant public choices, that could benefit from the ventilation of views that public participation entails.

Nevertheless, having the problem very clearly in mind, the Court in the National Wildlife case did hold that grants and grant regulations were excepted from the notice requirements of the administrative procedure act. The Ninth Circuit has considered the problem in the case of Good Samaritan Hospital versus Mathews

which is 609 Federal Second 949, and in that case the Circuit Court applied similar reasoning to the National Wildlife case to the benefit's exception on page 953 of its pending in Good Samaritan it says, "The APA rulemaking provisions require agencies and departments to give notice and to afford opportunity for comment by interested persons before rules are promulgated. It is not disputed that the Secretary of HEW did not adhere to the APA's notice and comment provisions in issuing Letter No. 51 and Section 206. Consequently, the validity of the rules depends on the applicability of one of the exceptions to the normal rulemaking procedures," and then further on down the page the Court says, "The magistrate held and the district court agreed that the benefit exception to the rulemaking procedures was applicable to the instant case," and then on page 954 the Court continues, "The reimbursement program relates directly to the benefits provided. The Congressional intent in providing the exception was to afford agencies procedural latitude regardless of the interest of affected parties and the public generally."

So that in the Good Samaritan case the Court does hold specifically that the requirement of the administrative procedure act as to notice need not to be followed as to the benefit and clearly, I think, also as to a -- as to a grant.

So that it will be the finding of the Court that the grant exception to Section 553 applies and that the fifty dollar rule is not invalid because of failure to follow the notice and public comment procedures.

Now, this brings us to the second general area of attack by the plaintiffs, namely the failure or alleged failure to follow other notice and procedure.

Arguments have been made on both sides of this question. It will be the finding of the Court there is nothing in the argument or the cases that have been cited to invalidate the fifty dollar rule for failure to follow these other notice requirements and procedures.

Certainly, publication is desirable as recognized by the National Wildlife case, but it is not essential.

I think also the considerations of retroactive -- retroactivity and actual knowledge involved in this particular case would militate against any finding of invalidity based on these various regulations and sections, that that would or might require publication of notice.

Now, this brings us to the very heart of this problem, which in my view is the question of invalidity of the fifty dollar rule for failure to comply with the impact aid statement, and here I believe we reach a much more perplexing problem than the mere problems of notice and publication.

With regard to the fifty dollar rule, its application, I believe, clearly has a substantial effect or had a substantial effect on the considerations involved here, but I also believe it is still only a interpretive rule in legal effect because it was not promulgated as a legislative rule pursuant to notice and comment section of the administrative procedure act; and in that regard with respect to a review of an interpreted rule the Courts certainly under the cases substitute their own judgment on the validity of rule in view of the statute and the regulations to which the rule purports to apply, and this again is considered in the Good Samaritan case that's already been cited on page 954 of that case, and the following appears, "Needless to say, in the review of an Interpretive rule, the Courts are free to substitute their own judgment on the validity of the rule in the light of the statutes and the regulations. The proper weight to be given an Interpretive Rule was considered by the Supreme Court in Skidmore v. Swift & Company, 323 U.S. 134, 65 Supreme Court 161", where it is said at page 164: "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will

depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Now, the impact aid act aid itself directs that in order to circulate -- strike that. In order to calculate the appelant's [*sic*] local contribution rate, the commissioner should determine which school districts within the state or in his judgment are generally comparable to the agency for which the computation is made; and if one examines 20 United States Code 238(3)(A) the following appears, "To compute the local contribution rate for a local educational agency for any fiscal year, the Commissioner, after consulting with the State educational agency of the State in which the local educational agency is located and with the local educational agency, shall determine which school districts within such State are generally comparable to the school district of the local educational agency for which the computation is made."

Now, the regulations that have been promulgated by the Department of Education state that the Department will select generally comparable districts based on various factors that are set forth in 34 Code of Federal Regulations Section 220.30, and if one turns to that section, and again I'm reading only fragments that will fill in the pertinent language. It starts out under (a) "In the case of a local educational agency," then I'm skipping some language and picking up, "The Secretary will, after consultation with the State educational agency and the applicant, determine those local educational agencies which, in his judgment, are generally comparable to the the [*sic*] applicant," and then further on in the section the language continues, "These data must include the following," and then ten criteria are enumerated such as the number of local educational agencies in the state and in each proposed group, the total average daily attendance, total revenue receipts, total revenue receipts from all sources including certain moneys and excluding others, total current expenditures from various sources and so on, so that a rather complete statement is

made with regard to the actual criteria that are to be used for determining comparability and then the regulation goes on, "In a State for which group classifications of generally comparable school districts cannot, in the judgment of the Secretary, be appropriately established pursuant to paragraph (a). An applicant may submit to the Secretary in its application the names of districts, approximately five in number, in the State in which it deems comparable to the local educational agency of the applicant."

Further on, "The selection by the applicant of such local educational agencies shall be based upon the criteria set forth in paragraphs (a)(1) through (a)(10) of this section." And then further on down, "The Secretary's determination will be based upon such criteria and any other relevant factors. The financial, attendance, and other data of the selected local educational agencies must be sufficient to justify the selection of such local education agencies as generall [*sic*] comparable and to determine the per pupil expenditures and the local contribution rates in such agencies. On the basis of the data furnished by the applicant, or information otherwise obtained, and applying the above criteria, the Secretary will select those local educaticnal agencies which he determines to be generally comparable to the applicant."

Now, in fiscal year 1979, the Department also used a grid or checkerboard with a list of criteria in order to make the selection of the generally comparable district. However in 1979, the real and final actual determinations appear to have been made pursuant to the fifty dollar rule, and I think under the presentation that's been made here and the various documents and arguments, it is quite apparent that the other factors, that is, the grid factors, really were not given any substantial consideration. They were perhaps considered up to a certain point, but then the fifty dollar rule was applied to deny the applications; and in my view, the defendants, that is the Deparment's [*sic*] interpretation of the act, was beyond its authority. It seems to me that the exclusive comparison between an applicant district and the group of selected

districts under the fifty dollar rule is made of current expenditures from local sources almost exclusively, and if one looks at the House committee report, which considered this problem, I think one would have to agree that the exclusive use of that factor was explicitly discouraged by the House Committee report and I'm referring to the House reports, 2287, 81st Congress on June 20th, 1950, in which considering comparable communities this was said, "The determination as to the amount of payments to be made with respect to each child depends in part, as has been said, upon a determination of the commissioner of education as to which school districts within the state are most nearly comparable to the school district of the education agency to be compensated."

In the last analysis a school district's current expenditures are determined by the amount of money it has available. In a school district providing education to large numbers of children connected with Federal property with current expenditures will be a [*sic*] affected by the fact that the Federal Government is not contributing it's proper share of local school revenues hence arriving at a sum which approximates the cost of educating Federal children in question. It would not be reasonable to consider merely current expenditures met from the revenue of the district in question. Among other things, the district would first consider similarities of classification under State law and then other relevant factors, such as numbers and kind of school population, tax resources, tax efforts, cost of school maintenance and operation, and the like. In some states the laws governing the classifications of school districts would have considered such factors sufficiently so that it would be unnecessary to go any further in determining comparability. In other states, however, this will not be the case.

In such case, resort will have to be had to the the [*sic*] various factors relevant to the determinatin of comparability. The greater the number of school districts that can be considered in the light of these factors, the more objective and equitable the determination will be. It would not affect the results, of course, insofar as the school district's eligibility for payment of the amount thereof is

concerned, that in actual fact, its current expenditures per child from local sources, including the payments under this section, turn out to be greater or less than the payment per Federal child.

Now, if Congress had intended to limit an applicant's local contribution rate to an amount that was close to/or within some kind of a tolerance of expenditures, of local revenues of that district, I think it would have been very simple to do so. Congress could have specifically said there shall be a limit, there shall be a cap. Now, the statute requires a comparison of districts more than a single criterion or rule, and the fifty dollar rule which appears to me in its effect an application here as a cap, to limit comparison to a single factor, I don't think is consistent with the statute, and I think it should for that reason be set aside as a rule of application in a case of this type.

Now, where the Court is to consider a legislative rule, that is a rule that has been promulgated after appropriate notice and opportunities for public comment, the Court is required to sustain such a rule, that is a legislative rule, unless the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. This is the standard of review that's set forth in Title 5 United States Code section 706. In other words, the Court in considering such a rule that's had the benefit of notice and public airing may set it aside only where it is found to be arbitrary or capricious.

Now, here the -- as I have indicated, the fifty dollar rule arises out of a grant situation and again by reason of my ruling in that regard, notice and comment, public comment, are not required. However, I think it is logical that in considering such a rule, that is a non-legislative rule, an interpretive rule, the Court should certainly apply the same kind of attention and scrutiny with regard to reasonableness and with respect to the fifty dollar rule, I have searched in vein for any rationalization for that rule.

I think counsel for the Government has been quite candid in

admitting that any particular figure other than the fifty dollars that's specified in this so-called rule would be equally arbitrary. Counsel for the government has also admitted that the effect of the fifty dollar rule is a preclusion, rather than consideration as one criterion among others. Accordingly, I think the rule has to be viewed with considerable suspicion.

I might also call attention to the fact that the administrative law judge in his decision agonized over this and wrestled with it and starting on page 18 and going on over to page 19 of the decision he stated the following, "Testimony reflects that the fifty dollar rule has existed and been in use since sometime in the early 1950's and that over the years, due to economic conditions the initial valuation of fifty dollars would have a present day value of at least one hundred fifty dollars. I find that the department should raise the fifty dollar rule to a more realistic monetary limitation.

Moreover, while I have held that publication is not mandatory, I nevertheless find that this rule is important in processing impact aid applications. The public and the educational community, in particular, would be better served to know this information. Therefore, in the interest of good management and fairness, I further find that the department should take the steps necessary to publish the fifty dollar rule under the law and then, of course, the administrative law judge, in effect says, well, nevertheless I'm bound by the rule and so he sustains it -- sustains it.

This Court, of course, is not bound by the rule, as I have indicated, and, accordingly, the Court finds that the fifty dollar rule is invalid as applied to the applications of the various plaintiffs in this case and for Federal impact aid; and the motions of the plaintiffs for summary judgment are granted and the motion of the defendant for summary judgment is denied.

Now, this leaves us with a very difficult problem as to what should be done at this point. We are talking about applications that were made I guess in 1958 (sic) or early '59 (sic). We are

talking about determinations that were made on the basis of a series of or group of criteria that were applied back in 1959. The suggestion is now made that we simply remand the whole thing to the Department of Education for further consideration with a wide open door to the promulgation of the whole set of new rules or criteria.

Under the circumstances, I just don't think that's reasonable. I don't think it's fair. While it's not controling [*sic*] to the decision of this Court that one hundred and twenty-nine applications of a similar nature were approved and benefits paid pursuant to such approval, I think it does demonstrate the problems of any kind of wide open remand to the Department to promulgate new rules, in effect, to start a new ball game entirely in considering the applications of the various class plaintiffs. I'm also, I think, affected by the fact that in case of seven of these plaintiffs, or seven of these local educational agencies, school districts, there was a specific approval at one point of their applications and then a rescission or rescinding of the application. As to the other districts that are involved here as class members, evidently although there's some different view as to what happened historically, those applications were submitted to the criteria that had been set up by the Department of Education and found to be comparable to the districts that had been presented as individually selected comparable districts, so I don't think it's reasonable or fair under the circumstances to go all the way back to the beginning and to, in effect, say we're going to create some new criteria, some new guidelines, we will have some new applications for 1979 benefits and then on the basis of the new guidelines that we establish with the new criteria we will then process those applications, examine them to determine the matter of comparability, and take it from there.

I think the Department is subject to some criticism for the manner in which these applications have been processed. Evidently, there was a certain amount of internal confusion, at least, within the Department, and I don't think that under the circumstances the plaintiffs in this case should have to retrace their

steps back to 1979 and start this process all over again under a new set of rules.

Accordingly, it will be the order of Court that the applications of the plaintiffs and the class members are remanded to the secretary of education for further consideration under the applicable statutes and regulations as they stood in 1979 without, of course, the use or application of the fifty dollar rule.

Mr. Solomon, will you please -- Well, Mr. Solomon and Miss Knopf, jointly, will you please prepare an appropriate order and submit it to counsel, please, for the Department of Education for approval as to form, and I might say this, I'm trying to thread my way here, as counsel can see, down a rather difficult and somewhat uncertain path. It would be appreciated by the Court if counsel for both sides could meet and try to work out a - if they can do so, an order that would be acceptable to both sides, having in mind the Court's determination that the fifty dollar rule should not apply, and that this matter should not start back at the very beginning for the reinvention of the wheel.

MR. SOLOMON: I'd be happy to do so.

MR. GLASS: I'm sure all counsel would be.

I have one comment and one question. After the administrative law judge decided four other cases, districts were based on rate, based on estoppel, the Department simply processed the applicants for payment. In other words, they took the amount and processed those four for payment. It would seem to me that --

THE COURT: They were paid --

MR. SOLOMON: They are not involved in this. Those rates -- Those four, Vista, isn't a part of the class.

THE COURT: Which?

MR. SOLOMON: Vista School District isn't part of the class nor South Bay. The Department simply processed according to the rates that came out of the grid test and the updated information on how many children and the tiers, and so forth, and simply issued checks.

THE COURT: Were those checks taken back or were those --

MR. SOLOMON: That's after the initial decision. That's --that was the three and then the one for Chula Vista on its first application. The point I'm getting to, that might be an appropriate way for this to be done as well, to be sent to the department for processing according to the LCR's found by the grid.

THE COURT: Well, I think that in effect is what I have indicated should be done.

MR. SOLOMON: Thank you, thank you.

THE COURT: Now, I'd like to see the order in its final form, of course, before I sign it.

MR. GLASS: Your Honor, I might speak to that for one second.

THE COURT: Yes.

MR. GLASS: First, as we noted in our brief, the money isn't there. There is only about five million dollars of unobligated impact aid money left over from fiscal 1979 and plaintiffs are claiming in excess of eleven million dollars, so we have to get that six million dollars from someplace. That's not a legal problem, that's an administrative problem but it is a very real problem.

THE COURT: Isn't that going to be -- I mean, assuming that this matter goes forward, isn't that going to be like any other judgment problem, in effect, can you collect; how much can you

collect?

MR. GLASS: It may require an application to Congress, and that's always a problem for that kind of money. The other problem is that to the extent that the criteria and the grid are inconsistent with the criteria in the regulations then a simple remand for reconsideration under the criteria in the regulation is not necessarily going to come out the same as remand in light of consideration of the criteria of the grid.

THE COURT: I'm not sure. Well, I believe I understand what you are saying, but, Mr. Glass, what you are indicating is that you would like to have it back in the hands of the Department so that they can reapply the regulations rather than the grid; is that what you are saying?

MR. GLASS: That's correct. That's correct.

THE COURT: The only problem with that again is the Department has chosen to construct the grid on the basis of the regulations. Now, in effect, you are asking that they go back to the drawing board of the regulations and construct a new grid or a new set of criteria and that is what I don't think should be permitted to be done here in view of the history of this matter.

MR. GLASS: I would suggest it wouldn't be a totally new construction. It would be a straight application of the -- application in the grid.

THE COURT: Grid.

MR. GLASS: I'm sorry. In the regulation. After all, it's our intention that the fifty dollar rule was also authorized by the criteria in the regulation and also the fact in the regulation that the Government was permitted to consider any other factors that it considered relevant, so I suppose what I am saying is a remand for consideration in light of the criteria in the regulation is appropriate

but not necessarily strictly the criteria in the grid because there is some difference between them. Some of the criteria in the grid are only appropriate insofar as their other relevant criteria which come within the catch all provision of the regulations.

THE COURT: Where and how do we get to the end of all of this? In other words, the Department promulgated regulations which they published.

MR. GLASS: That is correct.

THE COURT: The Department then created a grid, which according to the facts of the situation, was made known to all the parties. Isn't that correct?

MR. GLASS: That is correct.

THE COURT: All right. Why then should we back up again and start an entirely new process of consideration and construction of criteria? This is what existed in 1979. Why not apply it?

MR. GLASS: That's true but the fifty dollar rule also existed in 1979.

THE COURT: But the fifty dollar rule is invalid by this Court's determination.

MR. GLASS: I understand, but it seems to me that the question then goes back to the basic question that irrespective of the fifty dollar rule are these alleged school districts -- allegedly comparable in fact comparable? As we saw from application of the grid simply application of the grid did not result in comparable school districts.

I simply don't believe that's a reasonable conclusion and yet that is what a simple application of the grid leaves us with. If we're remanded for straight application of the grid, that's where

we end up, and I don't think that is consistent with the statutory purpose of Section 3 Assistance.

THE COURT: Well, I'm going to leave it like this. I will ask counsel to try to work out an order, if you can do so. If not, maybe we're going to have to come back and take another look at it.

MR. GLASS: Fine, your Honor.

MS KNOPF: Might I ask, in light of the fact that these applications are almost -- probably more than three years old, is there any time frame that the Court is placing on the Department to, as you say, further consider these applications under the standards that were in effect in 1979, absent the fifty dollar rule?

THE COURT: Well, I don't know what reasonable time would be. If you are talking simply about a computation, I would suppose that could be done rather easily, if the matter doesn't go back for total reconsideration and rule making and all the rest of it. If you are talking about payment, I am not sure how under the circumstances the Court could make any specific ruling with regard to a time table or deadline any more than the Court in an ordinary case where a judgment in a dollar amount is given makes any determination of when that dollar amount must be paid.

MS KNOPF: I understand that, your Honor. I'm thinking more in terms of compliance with the order in performing the evaluation of those applications in a reasonable time, processing those applications.

THE COURT: What in your view under the circumstances would be a reasonable time?

MS KNOPF: That's something that perhaps we can speak with counsel about and work out as long as the Court is expressing that mutual concern that it is done within a reasonable time.

THE COURT: I think it should be done within a reasonable time.

MS KNOPF: Thank you, your Honor.

MR. SOLOMON: Thank you.

THE COURT: Thank you, Counsel, for a very thorough presentation.

STATE OF CALIFORNIA)
: ss.
COUNTY OF SAN DIEGO)

I,
hereby certify that I am a duly-appointed and qualified court reporter pro tempore of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had before Federal Grand Jury No. on the ____ day of _____, 19__, and that said transcript is a true and correct transcription of my stenographic notes.

DATED at San Diego, California, this _____ day of _____, 19__.

Karen Hadley

REPORTER PRO TEMPORE

APPENDIX F

H.R. 2287, pages 11-14

CHILDREN RESIDING ON, OR WHOSE PARENTS ARE EMPLOYED ON, FEDERAL PROPERTY

Section 3 of the bill seeks to compensate school districts in reasonable amounts for the cost of educating children who, because they reside on tax-exempt Federal property or because their parents are employed on such property, do not in effect pay their own way. The underlying philosophy of this section is that the Federal Government, as a property owner, should pay to each local educational agency which furnishes education to children residing on or whose parents are employed on Federal property an amount per child roughly equivalent to the amount per child which other property owners in comparable communities pay toward the cost of educating children. Under this principle, Federal payments to school districts are more closely related to the "burden imposed" than to the value of the Federal property. The committee believes that this approach will be more equitable both to the Federal Government and to the local school districts involved.

Under the present pattern of school financing in the various States, most local educational agencies meet the local cost of educating their children from real-property tax revenues. Approximately half of the real-property tax required to meet the local share of the cost of educating a child is derived from taxation on residential property and half from taxation on commercial and other real property—in other words, half from taxation on homes where children live and half from taxation on the factories and offices where their parents work. The local educational agency derives no such revenue in the case of a child who lives on tax-exempt Federal property and whose parent is employed on such property. The payment per child for children living on Federal property is consequently geared to the total expenditures per child met out of local revenues by comparable school agencies in the State. Where a child lives on non-Federal property but the child's parent is employed on tax-exempt Federal property, the local educational agency will derive on the average half as much in

revenue as it would in the case of other children. Accordingly, the payments on the basis of children in the second category are one-half of the payments on those in the first category.

The problem is not, of course, a theoretical one. The effect on communities required to provide education to many children of parents whose residence or employment on Federal property deprives the educational agency of revenues is at the heart of the problem which confronts most of the school districts now suffering so severely from establishment or reactivation of Federal activities in their communities. The committee believes that the provision made by section 3 of this bill for aid to local education agencies so affected will prove the backbone of the instant program.

Situations to which section applies

There are no eligibility tests under section 3 corresponding to those already discussed under section 2 and those which will be mentioned later in connection with section 4. The provisions in sections 2 and 4 are designed to confine the Federal payments authorized under those sections to educational agencies which show a definite financial burden arising out of the impact of the Federal activity. This is not true of section 3. However, payments under section 3 for any year are limited to school districts in which the number of children residing on Federal property are not less than 10 and not less than 3 percent of the total number of children in average daily attendance during the year in question at the schools of such agency. Similarly, payments with respect to children whose parents work on Federal property are limited to school districts where such children number at least 10 and amount to at least 3 percent of the total number of children in average daily attendance. These limitations are designed to eliminate situations where the number of Federal children involved is so negligible (i. e., less than 10) as to entail administrative expenses in making payments out of all proportion to the amount of aid that would be given, or is so small in proportion to the total number of children to whom the local agency provides education as to be readily absorbed by the agency without appreciable hardship. However, discretionary authority is given to the Commissioner to

waive the 3-percent requirement in exceptional circumstances where its application would be inequitable and would defeat the purposes of the bill.

Local contribution rate

The payment per child residing on Federal property—i. e., the "local contribution rate"—is equal to the current expenditures per child made from revenues from local sources in school districts in the State which are comparable to the school district of the educational agency whose payments are being computed. While admittedly some school districts derive some local revenues from sources other than real-property taxes—e. g., local sales taxes—and while in such cases the loss suffered by the presence of tax-exempt Federal property is somewhat mitigated, it is thought that these exceptions are so few and the effect so slight as not to warrant different provisions therefor. Accordingly, the local contribution rate is derived by dividing the aggregate current expenditures during the second preceding fiscal year which local educational agencies in comparable school districts made out of revenues derived from local sources, by the aggregate number of children in average daily attendance at schools of such agencies during the same preceding fiscal year. The quotient is in effect the average amount per child that real-property owners contribute toward public elementary and secondary education; in the case of Federal children residing on Federal property, no corresponding amount is contributed by the Federal Government, the property being exempt from local taxation. The payment in the case of children who do not reside on Federal property, but whose parents work on such property, is one-half the local contribution rate.

No compensation for loss of State revenues

The effect of the payments provided for in this section is to compensate the local educational agency for loss in its local revenues. There is no compensation for any loss in State revenues. In many if not most States, current expenditures of local educational agencies are met in part through local reveneus and in part through State contributions, the State contributions being derived from

State taxation. The reason for not providing in the bill for any payment paralleling the State share in the cost of educating children who reside on or whose parents are employed on Federal property is that the tax-exempt status of the property in question does not normally operate to reduce to any appreciable extent State revenues or otherwise to render the State less able to make its normal contribution with respect to such children. Through sales, gasoline, income, and other forms of taxation, State governments are realizing or could realize substantially as much revenue from the parents of these children as they realize in the case of anyone else in the State. There may well be some apparent loss to the State resulting from its inability to levy and collect revenues directly on the activities of the Federal Government within its boundaries, but any such loss would be most difficult of reasonable determination and impossible to attribute to any particular local school problem. Besides, the State, because of the size and variety of its sources of taxation and of its tax methods, can realize benefits in indirect revenues from the carrying on of Federal activities within its borders which will offset what appears to be an immediate loss in its inability to tax directly the activities in question.

Because the payment is geared exclusively to current expenditures met out of local revenues, the bill will inevitably operate differently in different States depending upon the proportion of current expenditures for educational purposes which are met out of local revenues as contrasted with State revenues. Thus, in a State 90 percent of whose current expenditures for secondary- and elementary-school purposes are derived from local revenues, the Federal payment under section 3 will be considerably higher in relation to the total cost of educating a child than it would be in the case of a State which finances current expenditures in large part from State revenues. The committee has given careful consideration to this problem and has concluded that this difference in result is justified. Federal property ownership (and accompanying tax-exempt status) has a much greater impact upon the educational revenues in the first State than in the second State. Real-property owners in the first State bear a proportionately larger share of the educational cost burden than in the second State, and the Federal

Government as a property owner should do likewise. Conversely, as has been pointed out, the State which finances its educational cost in large part from revenues other than real-property taxes suffers correspondingly less loss from the tax-exempt status of federally owned property within its borders; in such a State, the Federal Government as a property owner should make a correspondingly smaller contribution, as do all other property owners in that State, to educational costs.

Comparable communities

The determination as to the amount of payment to be made with respect to each child depends in part, as has been said, upon a determination by the Commissioner of Education as to which school districts within the State are most nearly comparable to the school district of the educational agency to be compensated. In the last analysis, a school district's current expenditures are determined by the amount of money it has available. In a school district providing education to large numbers of children connected with Federal property, the current expenditures will be affected by the fact that the Federal Government is not contributing its proper share of local school revenues. Hence, in arriving at a sum which approximates the cost of providing education to the Federal children in question, it would not be reasonable to consider merely current expenditures met from local revenues of the district in question.

Among other things the Commissioner would first consider similarity of classification under State law, and then other relevant factors, such as number and kind of school population, tax resources, tax effort, costs of school maintenance and operation, and the like.

In some States the laws governing the classification of school districts would have considered such factors sufficiently so that it will be unnecessary to go any further in determining comparability. In other States, however, this will not be the case. In such States, resort will have to be had to the various factors relevant to the determination of comparability. The greater the number of school districts that can be considered in the light of these factors,

the more objective and equitable the determination will be. It would not affect the result, of course, insofar as the school district's eligibility for the payment, or the amount thereof, is concerned, that in actual fact its current expenditures per child from local sources (including the payments under this section) turn out to be greater or less than the payment per Federal child.

Unusual geographical factors

Special provision is made in the last sentence of section 3 (c) to take care of unusual situations where the school district whose payment is being computed is so unique because of unusual geographical factors that no school districts in the State could reasonably be said to be comparable to it. If, for example, the school district includes a military installation far removed from any cities of substantial size, the isolation of its school or schools may require unusually high teacher salaries, transportation, and other items of school expense, and may operate substantially to increase the costs of providing education. If no other school districts in the State are comparable from the standpoint of educational costs due to such isolation, the Commissioner is authorized to increase the local contribution rate by an amount which he determines will compensate the local educational agency for the increase in current expenditures necessitated by such unusual geographical factors. The amount of the increase will be the amount necessary to enable it to maintain a level of education equivalent to that maintained in the school districts determined by the Commissioner to be most nearly comparable.